Supreme Court, U.S.
FILED
02 - 34 JUL - 1 2002
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No.

IN THE

Supreme Court of the United States

Southwestern Illinois Development Authority,
Petitioner,

v.

National City Environmental, L.L.C.
and
St. Louis Auto Shredding Company,
Respondents.

On Petition for Writ of Certiorari
To the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Illinois Supreme Court, in ruling that petitioner's exercise of eminent domain was unconstitutional, disregard the holdings in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), and create a conflict with decisions in many other states, (a) by improperly substituting its judgment for that of the legislature in determining that the proposed use of the condemned property after the taking was not a public use; (b) by holding that the use of property taken by eminent domain is not a public use unless after the taking the general public has the use or enjoyment of the property as of right; and (c) by holding that a taking of property for economic redevelopment is unconstitutional if private business will earn a profit from the post-taking use of the property?

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Petitioner Southwestern Illinois Development Authority respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois on rehearing are reported at 768 N.E.2d 1 and are reproduced in Appendix A (A-1, A-18).[1] The original majority and dissenting opinions of the Supreme Court of Illinois, unreported, are set forth in Appendix B (A-46, A-74, A-75). The majority and concurring opinions of the Illinois Appellate Court, Fifth District, reported at 710 N.E.2d 896, are reprinted in Appendix C (A-85, A-101). The Order of the Circuit Court of St. Clair County is set forth in Appendix D (A-106), together with the transcript of the court's oral findings made April 23, 1998 (A-108).

JURISDICTION

The opinion and judgment of the Supreme Court of Illinois on rehearing were filed on April 4, 2002. The court's opinion does not contain a "plain statement" that it rests upon adequate and independent state law grounds. *See Michigan v. Long*, 436 U.S. 1032, 1040-42 (1983). The jurisdiction of this Court is grounded on 28 U.S.C. § 1257(a). This Petition was filed within 90 days of April 4, 2002.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution and Article I § 15 of the 1970 Illinois Constitution are set forth in Appendix E (A-112).

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[1] Pages of the Appendix will be cited "A-___."

Relevant portions of the Southwestern Illinois Development Authority Act, 70 ILCS 520/1 *et seq.*, are also reproduced in Appendix E (A-113).

STATEMENT OF THE CASE

Petitioner Southwestern Illinois Development Authority ("SWIDA") is a political subdivision and municipal corporation created by the Southwestern Illinois Development Authority Act (70 ILCS 520/1, *et seq.*), passed by the Illinois General Assembly in 1987 (the "Act"). The purpose of the Act was to create a favorable climate for job opportunities in the southwestern part of the State of Illinois in general, and in St. Clair and Madison Counties in particular, by encouraging economic and business development of all kinds (specifically including recreational, entertainment, and sports facilities), thereby lowering the area's unemployment, decreasing the need for public assistance, and increasing tax revenues in an area that had a high labor surplus and one of the higher tax delinquency rates in the state. 70 ILCS 520/2. To this end, the Legislature declared it SWIDA's "duty" to "promote development within the geographic confines of Madison and St. Clair counties" and to use its powers "to assist in the development, construction and acquisition . . . of commercial... projects within Madison and St. Clair counties." 70 ILCS 520/5.

Commercial projects that the Act was specifically intended to encourage include "any cultural facilities of a *for-profit* or not-for-profit type including but not limited to educational, theatrical, recreational and entertainment, *sports facilities*, *racetracks*, stadiums . . . sports training facilities, *parking facilities*, terminals, hotels and motels . . . ." 70 ILCS 520/3(j) (emphasis added).

SWIDA is authorized to issue bonds and to use bond proceeds to finance projects that carry out the purposes of the Act. 70 ILCS 520/7(a). It is also empowered to own, lease, sell, or otherwise dispose of interests in and to real property necessary to fulfill its statutory purposes. *See* 70 ILCS 520/6(d). The General Assembly further authorized SWIDA to "acquire *any real property*, or rights therein, *upon condemnation* . . . [and] to develop, construct and improve [such development projects], either under its own direction or through collaboration *with any approved applicant* . . . ." 70 ILCS 520/8(b)-(c) (emphasis added). SWIDA also has "quick-take" condemnation authority. *See* 735 ILCS 5/7-103(6).

The Development Project:
Gateway International Raceway

In June 1996, SWIDA, pursuant to its statutory powers and with the approval of the Governor, issued $21.5 million in taxable sport facility revenue bonds and loaned the bond proceeds to a private, for-profit corporation, Grand Prix Association of Long Beach, Inc. ("Gateway") to develop a major automotive racing facility in St. Clair County. Using the bond proceeds, which Gateway is obligated to repay, Gateway turned an existing small race course into Gateway International Raceway, a state-of-the-art 50,000-plus seat automotive racing and training facility capable of hosting major race car events. The ultimate goal is to expand the seating capacity of the raceway to the 85,000-100,000 seats needed to host a Winston Cup Series event, the premier and most prestigious of NASCAR's racing series.

The raceway has already triggered substantial economic development in the surrounding area and has created jobs for the people of the City of Madison, has

resulted in road improvements and bridge building, and has generated significant sales and entertainment tax revenues. The total economic impact of the raceway on the southwestern Illinois region was estimated to be $43.4 million dollars in 1997 alone, an amount that equals approximately 8-9% of the total tourism dollars that were generated in the surrounding eight counties during that same year. Tourism is now the second largest contributor to the region's economy.

Gateway added 10,000 seats to the racetrack in 1997 and planned to add another 20,000 seats in the fall of 1998. Total attendance in 1997 was approximately 400,000, and was expected to increase to 600,000 in 1998. Meanwhile, Gateway was advised that 30 acres it had previously leased and used for parking would no longer be available.

Testimony from an engineer for the Illinois Department of Transportation ("IDOT") responsible for traffic safety investigations established that more parking is needed to alleviate two traffic safety problems that have arisen because of Gateway. First, there is a need for more parking to reduce the amount of traffic that comes to a standstill on Interstate 55/70 waiting to exit onto Illinois Route 203, which is the major access road to the current parking area located on the east side of Route 203. Any stopped traffic on an interstate high-speed highway creates a safety hazard, and any additional parking will reduce the hazard. Second, there is a need for additional parking west of the racetrack to reduce the number of track patrons who now park east of the track and then have to cross Route 203 on foot. A parking lot immediately west of the track would allow track patrons to walk directly to the racetrack without crossing any major highway.

Furthermore, without additional parking, Gateway Raceway will not be able to expand to the desired 85,000-100,000 seat capacity needed to reach the goal of attracting a Winston Cup race to the area. Gateway considered building a parking garage on its property, but dismissed such a project as economically unfeasible.

The Site in Question

The site at issue is a vacant 148.5-acre parcel lying immediately west of the raceway. There are no public highways between the parcel and the racetrack. The parcel is owned by respondents National City Environment, L.L.C. and St. Louis Auto Shredding Co. ("NCE"), an auto metal-shredding operation. NCE does metal-shredding and operates a landfill on property that is near the subject parcel; but the parcel itself is not used in any current NCE operation, and NCE's plant manager acknowledged that NCE had no plan for any use of the property for another five to eight years. At that time, NCE might want to use the property for a landfill, but it has no permit to do so. Such a use would be further complicated because between 27 and 48 acres of the parcel are wetlands.

The evidence at trial showed that the subject parcel will satisfy both of the public safety factors identified by the IDOT engineer. It will provide additional parking for thousands of cars and divert traffic to another thoroughfare, thereby greatly reducing traffic congestion on I-55/70. It will allow use of the left turn lanes on Route 203, further alleviating the traffic problem. It will also give thousands of track patrons immediate access to the raceway without having to walk across Route 203 or any other public highway. Accordingly, the IDOT engineer testified that, from the standpoint of safety and to a reasonable degree of engineering cer-

tainty, it is necessary for SWIDA to acquire this property and for Gateway to develop it into a parking area, and the sooner the better.

All attempts to purchase the subject property from NCE were unsuccessful. After several overtures, both Gateway and SWIDA made a $1 million offer to NCE for the parcel in early 1998. This offer was in excess of the fair value ultimately determined by the trial court. NCE declined the offer without any counter-offer.

Gateway then filed an Application for the Use of Quick-Take Eminent Domain with SWIDA in February 1998, setting forth its urgent need for additional parking and the parcel's suitability for that purpose. On February 23, 1998, the St. Clair County Board unanimously passed a resolution finding that the expansion of parking at the Gateway racetrack would promote economic development in St. Clair County by: "(a) enhancing employment prospects for residents of St. Clair County; (b) boosting tax revenues of St. Clair County; and (c) expanding St. Clair County's tax base . . . ." The resolution authorized SWIDA to exercise its eminent domain authority to acquire the 148.5 acre parcel owned by NCE.

On March 5, 1998, SWIDA unanimously passed a resolution finding that the expansion of Gateway International Raceway would "enhance the public health, safety, morals, happiness, and the general welfare of the citizens of Southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County . . . ." The SWIDA resolution stated that Gateway had been unable to acquire by purchase the property it needed for expansion, and agreed to condemn the subject parcel pursuant to its statutory authority.

On March 5, 1998, SWIDA and Gateway entered into a written contract in which SWIDA agreed that, after it acquired title, it would convey the parcel to Gateway. The agreement specifically prohibited Gateway from selling the property or using it for any purpose other than the proposed development project without the approval of SWIDA.

Trial Court Proceedings

SWIDA filed this condemnation quick-take proceeding on March 31, 1998. NCE filed a Traverse and Motion to Dismiss urging, *inter alia*, that the taking was for an improper private use and therefore constituted an unconstitutional exercise of SWIDA's statutory eminent domain power under both the Illinois and the United States Constitutions (R. C47-49).

The condemnation hearing took place on April 21-23, 1998, in the Circuit Court of St. Clair County. SWIDA called 14 witnesses who provided testimony concerning: the traffic safety problems that would be alleviated by condemnation of the parcel and its use as a parking facility; the racetrack's pivotal role in promoting economic development, increased tourism, new jobs, an expanded tax base, and increased tax revenues throughout the region; the need for and the increased public benefits that would result from expansion of the racetrack's seating and parking capacity; and the elimination of blight in surrounding areas, which had already begun and was expected to continue to occur if the track is allowed to expand and grow.

NCE offered no witnesses on the issue of the racetrack's effect on economic development, job creation, tax base expansion, tax revenue increase, public safety, or blight. In fact, NCE offered only one witness prior to the preliminary compensation phase of the proceedings. The manager at NCE's auto shredding

plant testified that more than 80 people are employed at the company, grinding up cars, reselling the metal, and dumping the residual "fluff" on plant property. He confirmed that the parcel of land condemned by SWIDA was not being used by NCE, but might be used for dumping waste product in "[f]ive to eight years."

After hearing all the witnesses, the trial court approved the condemnation, holding, *inter alia*, that the subject condemnation was constitutional because it would serve three proper public purposes: public safety, economic development, and elimination of blight (Apdx D). The court also concluded that:

> "[Respondent] has been unwilling for years to negotiate in a meaningful fashion. Meanwhile the economic benefits to the people of Madison and St. Clair County are at risk if the track is not able to effectively plan a future for such major events as the testimony revealed, that one of which is the Winston Cup, due to a shortage of land to handle parking" (A-110).

Appellate Proceedings

On appeal to the Illinois Appellate Court, Fifth District, the judgment was reversed (Apdx C). The majority opinion held that, despite the economic development and public safety purposes served by the condemnation, the transfer of property from one private owner to another private owner, such as Gateway, exceeded SWIDA's constitutional authority and was not a proper "public use" under Article 1, § 15 of the 1970 Illinois Constitution and the Fifth Amendment to the United States Constitution applicable to the states through the Fourteenth Amendment (A-85). The concurring judge opined that the eminent domain provisions of the Act empowered SWIDA to condemn the parcel and

transfer it to Gateway for the purposes established, but that the statute itself was unconstitutional and that economic development does not constitute a public purpose (A-101).

Petitioner's Petition for Leave to Appeal to the Illinois Supreme Court was granted. After oral argument, four of the seven members of the Supreme Court were replaced due to retirements and elections. On April 19, 2001, the judgment of the Appellate Court was reversed in a 4-3 decision (Apdx B). The majority opinion by Justice Freeman relied on *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), in holding that the taking satisfied the "public use" requirements of the Fifth Amendment (A-46-74). Two dissenting opinions were filed (A-74, A-75).

Respondent filed a Petition for Rehearing, which was granted, and the case was reargued on September 16, 2001. On April 4, 2002, the Court reversed itself and split 5-2 in affirming the decision of the appellate court holding the taking unconstitutional under the federal and state constitutions (Apdx A). The majority opinion by newly-appointed Justice Garman phrased the dispositive issue as "whether eminent domain powers authorized by the State of Illinois were improperly exercised in the taking of private property from one private entity for the benefit and use of another private entity" (A-10).

The Court recognized the "extensive" evidence showing that the taking would allow for growth and prosperity and would "contribute to positive economic growth in the region" (A-14). The majority also noted the public safety aspect of the taking and acknowledged "that a public use or purpose may be satisfied in light of public safety concerns" (A-13). Nevertheless, the majority,

stating that the determination of public use is a judicial function (A-11), held that the public use requirement was not satisfied. The court emphasized that the Gateway racetrack was not available to the public "by right," but only upon payment of a fee (A-13), and that it was operated for private profit (A-15). The court also pointed out that other options were available to Gateway to solve its parking problem (A-16).

Justice Freeman, joined by Justice McMorrow, filed a 23-page dissenting opinion calling the majority opinion "alarming" (A-38), accusing the majority of "seek[ing] to unravel the holdings" of *Berman* and *Midkiff* (A-39), and pointing out that the requirement that taken property must be accessible to general public as of right would be the "death of social legislation in furtherance of economic development and revitalization" (A-45). [2]

REASONS FOR GRANTING THE PETITION

This case, reported to have been "closely watched both by economic-development officials and property-rights advocates," has been called "the most important case in years to curb local government use of eminent domain powers." Starkman, "High Court Curbs Use of Eminent Domain Powers," *The Wall Street Journal*, Apr. 5, 2002, p. B2. The decision below is reflective of a "new wave" of litigation attacking traditional, well-ingrained "public use" jurisprudence. This national trend of attempting to limit the use of eminent domain to take land to assist private enterprise has been recognized by leading national publications. See, *e.g.*, "More Courts Rule Cities Misapply Eminent Domain," *The Wall Street Journal*, July 23, 2001, p. B1.

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[2] The Illinois Supreme Court has stayed its mandate pending disposition of this petition.

The decision below is the Trojan Horse for this emerging anti-eminent domain movement. The reconstituted Illinois Supreme Court, on rehearing, did an abrupt U-turn, reversed its previous 4-3 opinion which had followed existing law, and blazed a new trail that brings it into conflict with controlling authority from this Court as well as prevailing decisions in numerous states. No explanation was given for this remarkable about-face. It is axiomatic, of course, that if the existing rules laid down by this Court are to be changed, they must be changed here, not in Springfield, Illinois. *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 474, 484 (1989) (lower courts have duty to follow directly applicable decisions of this Court). Hence, review of this significant ruling by this Court is imperative.

I. The Decision Below Conflicts With *Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1942).

The Illinois Supreme Court, by substituting its determination of "public use" for that of the legislature, blatantly disregarded controlling decisions from this Court. In *Berman v. Parker*, 348 U.S. 26 (1954), the Court unanimously sustained legislation providing for eminent domain to redevelop slum areas in the District of Columbia and contemplating the sale of the condemned land to private interests. In analyzing whether the taking was for a "public use," the Court, through Justice Douglas, said:

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . . Once the object is within the authority of Congress,

> the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end . . . . Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been determined." *Id.* at 32-33.

The *Berman* Court cautioned that "the role of the judiciary in determining whether the power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.* at 32, citing *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); and *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552 (1946).

The broad holding in *Berman* was applied to state eminent domain proceedings in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Hawaii had taken private property for just compensation simply to reduce the concentration of fee simple ownership in the State. The Ninth Circuit there, like the Illinois Supreme Court here, concluded that the enabling legislation was "a naked attempt on the part of the State of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.* at 235, quoting 702 F.2d at 798. Accordingly, the Court of Appeals ruled that the State's determination of public purpose was not deserving of judicial deference.

This Court reversed in a unanimous opinion by Justice O'Connor. It reiterated *Berman*'s lesson that the legislative declaration of public use is "well-nigh conclusive," and that the role of the Court is "extremely narrow." *Midkiff*, 467 U.S. at 239, 240. The public use requirement is "coterminous with the scope of a

sovereign's police powers," and the judiciary may not substitute its judgment "as to what constitutes a public use unless the use be palpably without reasonable foundation." *Id.* at 240, 241, quoting *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896). The Court acknowledged that private property cannot be taken for the benefit of another private person without a justifying public purpose, "[b]ut where the exercise of the eminent domain power is rationally related to a conceivably public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241.

If the government rationally could believe that the taking would promote its public objective, the constitutional requirement is satisfied. *Id.* at 242. And it is not necessary that the government possess and use the property at some point during the taking, *id.* at 243, or that the entire community, or even a considerable portion thereof, be permitted to directly enjoy the improvement in order for it to be a public use. *Id.* at 244, citing *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923).

The *Berman/Midkiff* analysis was reaffirmed most recently in *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992): "We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking is 'rationally related to a conceivable public purpose.'"

Against this well-defined backdrop, the decision of the Illinois Supreme Court smacks of defiance, if not rebellion. The state legislature had included racetracks and parking facilities in the list of public interest projects that could revitalize the redevelopment area, and indeed the racetrack had been built and financed

pursuant to that provision. The County Board subsequently determined that increased parking for the racetrack would improve the economic climate in the area to an even greater degree by enabling the track to attract more desirable racing events. The Board found that expansion of the racetrack facilities would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by generating additional tax revenues. SWIDA, after notice and a public hearing, adopted a resolution listing the numerous benefits that the proposed project could create for the region. Yet these determinations were summarily swept away without a hint of deference by the state supreme court. Although it paid lip service to *Berman*, the court arrogated to itself the public-use determination: "Courts all agree that the determination of whether a given use is a public use is a judicial function" (A-11).

The Illinois court's repudiation of this Court's precedent is starkly reflected in the following passage from its opinion:

> "SWIDA contends that the 'wisdom . . . of the legislation and "the means of executing the project" are beyond judicial scrutiny "once the public purpose has been established." It is that purpose which controls and not the "means" or "mechanics" of how the purpose is carried out.' *We disagree*." (A-17, emphasis added.)

This was not merely SWIDA's contention — it was an almost verbatim summary of this Court's opinion in *Berman*, 348 U.S. at 33-34. By disagreeing with SWIDA, the Illinois Supreme Court disagreed with the constitutional parameters of the public use doctrine repeatedly reiterated by this Court.

Accordingly, unless *Berman* and *Midkiff* are to be overruled, the decision below cannot stand. It not only changes the law in a way that conflicts with this Court's rulings, but it creates uncertainty and confusion in that the validity of any taking will depend on the whim of the judges hearing the case and their individualized, *ad-hoc* notions of what uses should be considered "public." Indeed, this entire case was turned upside-down because two judges who decided this particular use was public in April 2001 changed their mind without explanation and labeled it private in April 2002. As a significant pronouncement from an influential tribunal in a major industrial state, the decision below is certain to be lauded and trumpeted by anti-development forces around the country. Review by this Court is thus required.

II. The Decision Below Conflicts With Numerous Decisions From Other States Which Have Upheld the Use of Eminent Domain for the Development of Parking Lots, Racetracks, and Other Similar Redevelopment Projects that Benefit Both Public and Private Interests.

The aberrant nature of this ruling is evident from a quick perusal of Volume 2A of the prominent treatise *Nichols on Eminent Domain* (3d ed. 2002). In section 7.06[12], the author notes that 16 states have upheld the taking of private property for public parking lots that benefit private interests, *id.* p. 7-142 n. 119; that four states have ruled that the operation of a parking lot by a private person does not negate the validity of the taking, *id.* p. 7-143 n. 123; and that three states have specifically recognized that a benefit to private merchants whose businesses are in the area does not render a parking-lot project private so long as the public good is served. *Id.* p. 7-144 n. 125.

The underlying premise of the Illinois court that the Gateway International Raceway itself is not a public use is likewise in direct conflict with a recent decision of the Kansas Supreme Court. In *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 543 (Kans. 1998), the court addressed a challenge to a proposal under the urban redevelopment law which authorized the use of eminent domain and government-backed financing for the construction of a super speedway auto race track facility and related projects to be owned and operated for profit by a subsidiary of International Speedway Corporation. The Kansas Supreme Court rejected the same arguments made by respondent in the present case and held that ". . . the auto racetrack facility and related projects are valid public purposes for which TIF and STAR bonds may be issued and eminent domain authority exercised." *Id.* at 554.

So while Gateway's competitor has built a racetrack facility and associated amenities less than 300 miles away with assistance from the State of Kansas and the power of eminent domain, Gateway has not only been denied such consideration in Illinois but, to add injury to insult, has been handed a bill for more than $1,000,000 in attorneys' fees allegedly owed to NCE's lawyers. A more dramatic and economically significant example of interstate conflict could scarcely be imagined.

III. The Illinois Supreme Court's Requirement of Public Access as of Right, and Its Prohibition of Private Profit Is Inconsistent With Decisions of This Court and of Various State Courts.

The *Nichols* treatise points out that "use" can mean either actual utilization by the public (a narrow interpretation) or deployment for public advantage (a broader construction). *Nichols* § 7.02. This Court has consis-

tently applied the more liberal meaning of use; indeed *Midkiff* expressly held that actual utilization by the public — or even a sizeable portion of the public — is not necessary to a finding of public use. *Midkiff*, 467 U.S. at 244. *Nichols* § 7.03[4], p. 7-42 n. 20 cites decisions from six other state courts endorsing the same rule. Yet the Illinois court imposed a requirement that the general public must not only have access to the project but that such access must be *without charge* (A-13). That is a remarkable appendage to the public use concept that would prohibit takings for a wide range of projects from toll roads to entertainment complexes to penal institutions. The dissenting opinion below accurately forecasted that such a requirement would sound the death knell for takings in furtherance of economic redevelopment.

The requirement of free public use is an apparent corollary of the Illinois court's implicit proscription of any private profit that might result from the re-deployment of the taken land. The court said of the parking facility: "It is a private venture designed to result not in a public use but in private profits" (A-13), as if the two were mutually exclusive. But this Court has consistently held that benefits to private individuals do not invalidate a taking as long as they are derived from serving the public. *See, e.g., Hendersonville Light & Power Co. v. Blue Ridge Interurban R. Co.*, 243 U.S. 563 (1917); *Union Lime Co. v. Chicago & N.W. R. Co.*, 233 U.S. 211 (1914).

Likewise, the decision below creates a conflict with various modern rulings in other states. In the Kansas raceway case, for example, the Kansas Supreme Court, upholding a public use finding, said: "'The mere fact that through the ultimate operation of the law the possibility exists that some individual or private corporation might make a profit does not, in and of itself,

divest the act of its public use and purpose.'" *Wyandotte County*, 962 P.2d at 553-54 (citation omitted). *See also Burgyn v. City of Bristol*, 774 A.2d 1042, 1047 (Conn. App. 2001) ("public purpose continues even though the property is later transferred to private persons"); *In re Fisher*, 730 N.Y.S.2d 516, 517 (App. Div. 2001) (public use findings not impaired by fact that proposed project will incidentally confer private benefit).

Review by this Court is necessary to reconcile these diverging viewpoints.

IV. The Illinois Supreme Court's Substitution of Its Own Notion of Public Use for That of the Legislature Was Improper.

The Illinois court also held that the scope of judicial review of the proposed use depends on the condition and use of the land prior to the taking — a concept that has no basis in precedent. The court below correctly noted that takings of slums and blighted areas are permitted "regardless of the subsequent use of the property" (A-13). But the court held that very different considerations apply when the property taken is already being put to a productive use (a dubious and speculative proposition here since the land in question was vacant). Instead of inquiring whether the legislative finding of public benefit was "palbably without reasonable foundation" or whether the taking was "rationally related to a conceivably public purpose," as required by *Midkiff*, the court merely concluded that "this condemnation clearly was intended to assist Gateway in accomplishing their goals in a swift, economical, and profitable manner" (A-15).

The court's new demarcation between takings for slum clearance and takings for economic redevelopment again contradicts this Court's case law and creates a conflict with decisions in many states. While

Berman did indeed involve a blighted area, the very same principles were reiterated and applied in *Midkiff*, which involved neither slum clearance nor redevelopment but merely the State's concern about the concentration of land ownership. The issue in *all* cases is whether the taken property will be put to a public use, and the deference to be accorded to the legislative findings does not vary depending upon the use of the land prior to the taking.

Here, three different levels of the legislative branch — the Illinois General Assembly, the St. Clair County Board, and SWIDA itself — had made determinations that this project promoted a public purpose and that the raceway facility and the proposed parking lot would constitute a public use for the condemned property. The trial court, after hearing the testimony of 14 witnesses, expressly found three public purposes for the taking (A-108). The Illinois Supreme Court ignored all of those findings and paid them no deference at all. As noted in the dissent, "Indeed, the majority does not afford any measure of deference to the legislative determination" (A-38).

The majority's summary finding of "no public use" is particularly astonishing in light of its acknowledgements (1) that spectators at the racetrack would "benefit greatly" from increased parking (A-13); (2) that additional parking could benefit the members of the public who choose to attend events at the racetrack and increase their safety (A-13); (3) that "a public use or purpose may be satisfied in light of public safety concerns" (A-13); (4) that petitioner "presented extensive testimony that expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region" (A-14); and (5) that "economic development is an important public purpose" (A-14).

Despite these acknowledged public benefits and the tri-level legislative judgments, the Illinois Supreme Court dispensed with any notion of judicial restraint or deference but instead engaged in a kind of *de novo* balancing exercise to determine whether the "primary intended beneficiaries of the taking" were private businesses or the public (A-15). Again, this analysis was foreclosed by the rule of *Berman* and *Midkiff* that once the public purpose is established, the means of implementation are left to the legislative branch — a rule with which the Illinois court expressly chose to "disagree."

The only kind of compensated taking that is proscribed under the Public Use Clause is one that has *only* a private purpose. *Midkiff*, 467 U.S. at 241. The Illinois court's attempt to weigh the public benefits against the private benefits was therefore inappropriate and again conflicts with the law in many other states. *See Nichols* § 7.03[11] p. 7-70, listing twenty states that have endorsed the view that "legislative determinations are given great deference in determining what is a valid public use" — a notion that Illinois has now abandoned. [3]

V. This Case Has Nationwide Significance and Should Be Reviewed by This Court.

The Illinois Supreme Court got it right the first time. But upon reconsideration, the reconfigured court changed course and undertook to rewrite the rules in this significant area of the law. Justice Freeman, who

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[3] Another recent case reflective of the burgeoning anti-condemnation movement is *Township of West Orange v. 769 Associates, L.L.C.*, 775 A.2d 657, 662-63 (N.J. App. 2001), where the court applied "heightened scrutiny" to determine whether the benefit to the private party "is truly incidental rather than the principal purpose." *But see, contra, Burgyn v. City of Bristol*, 774 A.2d at 1046 n. 7 (rejecting request to employ "heightened scrutiny").

penned the original prevailing opinion, perceptively characterized the work of the new majority on rehearing:

> "Today's opinion is not an accurate rendition of the holdings of *Hawaii Housing* and *Berman* and of the principles of law involved in this area . . . (A-30).
>
> "The majority opinion is alarming both for its use of selective portions of *Hawaii Housing Authority* and *Berman* and for its attempt to engraft an additional principle [of public access by right] upon the public use doctrine . . . (A-38-39).
>
> "Not only is the majority disingenuous in its citation to *Hawaii Housing Authority* and *Berman* but it seeks to unravel the holdings of these opinions, for in imposing a requirement that the property be put into use for the general public, the majority effectively interdicts any taking for the purpose of economic development" (A-39-40).

With regard to the requirement that property taken by eminent domain must be accessible to the general public as a matter of right, Justice Freeman said: "This requirement is the death of social legislation in furtherance of economic development and revitalization" (A-45).

As reflected in the *Wall Street Journal* articles cited above, this iconoclastic decision will reverberate well beyond the borders of Illinois and will be a rallying point for those urging new constraints on the use of eminent domain. The uncertainty and inconsistency caused by *de novo* judicial review of legislative public use determinations is the precise evil addressed by this Court's current jurisprudence. *See Welch*, 327 U.S. at 552 ("Any departure from this judicial restraint would result in courts deciding on what is and is not a govern-

mental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."). The roller-coaster ride of this case through the Illinois court system, featuring seven appellate opinions spanning 105 printed pages, is a vivid testament to the unpredictability that inheres in judicial second-guessing of public-use determinations.

The Court should grant review to clarify the public use doctrine and the proper role of the judiciary in eminent domain, to resolve the conflict among the states, and to reaffirm the well-established salutary principles that were discarded below.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 2002

APPENDIX

APPENDIX A

Filed
Apr 4 2002
SUPREME COURT OF ILLINOIS

DOCKET NO. 87809
AGENDA 16
SEPTEMBER 2001.

THE SOUTHWESTERN ILLINOIS
DEVELOPMENT AUTHORITY,
Appellant,

v.

NATIONAL CITY
ENVIRONMENTAL, L.L.C., *et al.*,
Appellees.

JUSTICE GARMAN delivered the opinion of the court:

The issue in this case is whether the Southwestern Illinois Development Authority (SWIDA) properly exercised the power of eminent domain to take property owned by National City Environmental, L.L.C., and St. Louis Auto Shredding Company (collectively NCE), and convey that property to Gateway International Motorsports Corporation (Gateway). The Circuit court of St. Clair County ruled that SWIDA had properly exercised its authority to take the land in question. The appellate court reversed. 304 Ill. App. 3d 542. On April 19, 2001, we reversed the decision of the appellate court, but subsequently granted rehearing. We now affirm the decision of the appellate court.

BACKGROUND

SWIDA was created in 1987 by the Illinois General Assembly through passage of the Southwestern Illinois

Development Authority Act (the Act) (70 ILCS 520/1 *et seq.* (West 1998) (formerly Ill. Rev, Stat. 199 1, ch. 9 5, par, 6151 *et seq.*)). SWIDA is a political entity and municipal corporation whose stated purpose is to "promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety morals, happiness and general welfare of this State." 70 ILCS 520/2(g) (West 1998).

The Act mandates that SWIDA "promote development within the geographic confines of Madison and St. Clair counties." 70 ILCS 520/5 (West 1998). It is the duty of SWIDA to assist in the development, construction, and acquisition of industrial, commercial, housing or residential projects within these counties. 70 ILCS 520/5 (West 1998). A "[c]ommercial project" is defined as "'any cultural facilities of a for-profit or not-for-profit type including *** racetracks *** [and] parking facilities." 70 ILCS 520/30) (West 1998).

To accomplish the purposes of the Act, the legislature empowered SWIDA to issue bonds for the purpose of acquiring, improving or developing projects, including those established by business entities attempting to locate or expand property within Madison and St. Clair Counties. 70 ILCS 520/7 (West 1998). SWIDA also has the authority to acquire property by condemnation. According to the Act, SWIDA's "acquisition by eminent domain of such real property or any interest therein by [SWIDA] shall be in the manner provided by the 'Code of Civil Procedure' [735 ILCS 511-101 *et seq.* (West 1998)], *** including Section 7-103 thereof [735 ILCS 5/7-103 (West 1998)]." 70 ILCS 520/8(b) (West 1998).

In June 1996, SWIDA issued $21.5 million in taxable sports facility revenue bonds. The proceeds of the bonds

were lent to Gateway to finance the development of a multipurpose automotive sports and training facility in the region (the racetrack). Gateway signed a loan agreement and a note to evince its obligation to repay the loan. Revenues received by SWIDA pursuant to the loan agreement are pledged to secure payment of the bonds. 70 ILCS 520/7(d) (West 1998). If at any time SWIDA is unable to pay the principal and interest on the bonds, it shall so certify to the Governor, who then submits the amounts so certified to the General Assembly. As such, the bonds constitute a moral obligation of the state, 70 ILCS 520/7(f) (West 1998).

The racetrack was developed and has flourished. In 1997, the racetrack had a total attendance of 400,000 at various large and small events. Seating included 25,000 grandstand seats and 25,000 portable seats. In 1998, Gateway increased its seating capacity and desired to increase its parking capacity as well. It called upon SWIDA to use its quick-take eminent domain powers to acquire land to the west of the racetrack for the purposes of expanded parking facilities. The adjacent 148.5 acre tract of land sought was owned by NCE.

NCE operates a metal recycling center in an area of St. Clair County that, until recently, was National City, Illinois. NCE employs 80 to 100 persons full time and has been at its present location since 1975. NCE shreds cars and appliances and separates the reusable metals. It disposes of nearly 100,000 cars per year. Nonrecyclable by-products of the process, referred to as "fluff," are deposited in NCE's landfill, located to the east of its recycling center. When this landfill site reaches capacity, NCE plans to expand its landfill operations onto the 148.5 acre tract of land it owns to the east of the current landfill. NCE uses clay and dirt from the 148.5 acre tract to fill and cover fluff in the landfill area currently in use.

In early 1998, Gateway attempted to discuss the purchase of NCE's land with NCE's owner. NCE would not discuss the matter and, initially, Gateway made no offer to purchase the land, Instead, Gateway asked SWIDA to exercise its quick-take eminent domain powers to take the 148.5 acres of land and transfer it to Gateway.

Gateway completed a "Quick-Take Application Packet" and stated that it wanted to use the land as a parking lot for the purpose of increasing the value of Gateway's racetrack.Gateway paid SWIDA an application fee of $2,500, and the sum of $ 10,000 to be applied toward SWIDA's sliding scale fee of 6% to 10% of the acquisition price of property being condemned. In addition, Gateway agreed to pay SWIDA's expenses, including the acquisition price of the property and other costs associated with the quick-take process.

Approval of the county board is required before SWIDA can use its quick-take eminent domain powers within unincorporated areas of a county. 70 ILCS 520/8(b) (West 1999). On February 23, 1998, the St. Clair County board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain authority to acquire the NCE tract of land for Gateway parking. The board noted that dramatic attendance increases could be expected at the racetrack and that it was necessary to create additional parking facilities to adequately serve patrons. The board also found that expansion of the racetrack facilities would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in the area and generating additional tax revenues.

On March 5, 1998, SWIDA held a public meeting to address the proposed taking. Notice was given to NCE

and adjacent property owners. Over the objections of NCE's counsel, SWIDA adopted a resolution manifesting an intent to assist Gateway with racetrack expansion through the acquisition of NCE's property. Like the St. Clair County board resolution, SWIDA's resolution recounted the numerous benefits that could be created for the region. SWIDA found that the acquisition of NCE's property was essential to the success of the proposed expansion and further development of the racetrack, and authorized its executive director, Alan Ortbals, to acquire title to the property by all necessary and appropriate means, including negotiations and quick-take eminent domain proceedings. SWIDA authorized the execution of an agreement with Gateway for acquisition of the property through quick-take eminent domain proceedings and subsequent conveyance of the property to Gateway.

In an effort to acquire the property through a negotiated sale, Ortbals attended a meeting on March 17, 1998, at which he delivered to NCE a written offer to purchase the property for $1 million. By letter dated March 19, 1998, NCE rejected the $1 million offer but indicated its willingness to meet with SWIDA the week of March 30, 1998, following an expected appraisal of the property. On March 20, 1998, SWIDA made another written offer to NCE to purchase the property for $1 million and advised NCE that SWIDA would initiate proceedings to condemn the property if NCE did not accept the offer by 5 p.m. on March 30, 1998.

NCE did not respond to the second offer and ultimatum until April 20, 1998. By letter, NCE indicated that it felt it was unnecessary to respond to the offer, as SWIDA was aware of NCE's prior rejection of the earlier offer to purchase the property for the identical sum of $1 million. However, to be clear on the matter, NCE indicated that it was again rejecting the offer of $1

million for the sale of its property

Meanwhile, on March 31, 1998, SWIDA filed a complaint in the circuit court of St. Clair County seeking condemnation of, and acquisition of fee simple title to, the property. In addition, SWIDA filed a motion for immediate vesting of title, and asked the circuit court to fix a date for quick-take proceedings pursuant to sections 7-103 and 7-104 of the Code of Civil Procedure (735 ILCS 5/7-103, 7-104 (West 1998)). On the same date, NCE filed a motion to dismiss the complaint and on April 2, 1998, filed a traverse and motion to dismiss. NCE argued that the proposed taking was for an unconstitutional private use; the proposed taking was excessive; additional parking at Gateway's racetrack was not needed; and SWIDA had failed to make a good-faith effort to negotiate an acceptable purchase price with NCE. In addition, NCE filed a motion to strike SWIDA's request for immediate vesting of title. The circuit court denied both the motion to dismiss and the motion to strike the request for immediate vesting of title.

The circuit court held a quick-take hearing and on April 27, 1998, ruled in SWIDA's favor. Relying on testimony from Mike Pritchett of the Illinois Department of Transportation (the Department), the circuit court found that the taking was for a public purpose as there were serious public safety issues involved. Pritchett had testified that the Department was working with Gateway to develop a traffic plan that would move traffic into and out of the racetrack facility, while minimizing impact on the surrounding state and interstate highways. According to traffic pattern data studled by the Department, significant traffic congestion occurred on Interstate 55-70 when major events were held at the racetrack. According to Pritchett, a safety hazard was created because drivers do not normally anticipate stopped traffic on the interstate. Pritchett

further testified that pedestrians often crossed Illinois Route 203 from the parking areas east of the highway to the racetrack. A traffic signal was in place to allow patrons to cross Route 203. However, the signals created even more automobile traffic delays. There was additional testimony that there was a risk pedestrians would be struck by automobile traffic as they crossed Route 203 at improper locations away from the designated crossing area and signal. Pritchett testified that construction of a parking lot on NCE's property, as suggested in the Department's 1996 traffic impact study, would provide parking to the west of the racetrack and alleviate traffic problems when major events were taking place at the racetrack. Therefore, according to Pritchett, there was some urgency in acquiring the property and developing parking facilities to alleviate stress on the highway system and improve safety.

The circuit court also relied on Ortbals' testimony regarding public safety, economic development, and elimination of blight. According to Ortbals, the county was experiencing serious traffic problems on days the racetrack hosted events. Like Pritchett, Ortbals also referred to congestion on Interstate 55-70 and traffic and pedestrian concerns related to Illinois Route 203. In addition, Ortbals testified that development of a parking facility on the property was necessary to promote economic development, as the number of spectators, development and expansion of neighboring businesses, and other economic spin-off, all had exceeded initial expectations. Ortbals testified that it was necessary to acquire the entire 148.5 acre tract owned by NCE because areas that had previously been used for patron parking, such as areas now occupied by hotels and restaurants and the golf course, were no longer available. In addition, Ortbals testified that the development of the racing facilities had indirectly helped to

eliminate blight in the area.

Rod Wolter, president and general manager of Gateway International Raceway, testified that by turning the 148.5 acres owned by NCE into parking for the racetrack, Gateway would grow and profits would increase. Wolter acknowledged that Gateway had discussed developing a parking garage facility to meet its needs but that it would be much less expensive to have SWIDA take the property in question from NCE and give it to Gateway for ground parking.

The circuit court also heard testimony from a number of other sources, including city officials from the region, area businessmen and other Gateway officials. Most, if not all, testified as to the many benefits that continued expansion of Gateway could potentially bring to the area. The court found that the taking was not excessive and that NCE had been unwilling to negotiate in a meaningful fashion for the sale of the property. The court found that SWIDA had bargained for the property in good faith and NCE's failure to timely reject SWIDA's final offer of sale or to present a counteroffer was dispositive of this issue. Therefore, the circuit court held that quick-take procedures were necessary to avoid any negative economic impact to the people of the region.

The circuit court denied NCE's oral motion for a stay of proceedings (see 735 ILCS 5/7-104(b) (West 1998)) and heard evidence of just compensation for the property (see 735 ILCS 5/7-104(c) (West 1998)). On April 28, 1998, the circuit court made a preliminary finding that $900,000 was just compensation for the property. On April 30, 1998, the circuit court entered an order of taking, vesting SWIDA with title to the property in fee simple and granting it the right to immediate possession of the property. See *735* ILCS 5/7-105(a) (West

1998)). On the same day, SWIDA conveyed title to the property to Gateway by way of a quit-claim deed. NCE filed an emergency motion in the circuit court seeking a stay of the transfer of title or, in the alternative, an order requiring SWIDA to post a bond of $38 million pending appeal. The motion was denied.

Pursuant to section 7-104(b) of the Code of Civil Procedure (735 ILCS 5/7-104(b) (West 1998)) and Supreme Court Rule 307(a)(7) (188 Ill. 2d R. 307(a)(7)), NCE filed an interlocutory appeal arguing in part that SWIDA lacked constitutional authority to take the property and convey it to Gateway. NCE also filed an emergency motion for a stay of the condemnation, which was granted.

The appellate court determined that SWIDA had exceeded its constitutional authority in taking NCE's land by eminent domain and reversed the decision of the circuit court. 304 Ill. App. 3d 542.

SWIDA filed a petition for leave to appeal pursuant to Supreme Court Rule 317 (134 Ill. 2d R. 317). We granted the petition and on April 19, 2001, reversed the judgment of the appellate court and remanded the cause. Subsequently, NCE petitioned this court for rehearing, which we allowed on June 4, 2001. 155 Ill. 2d R. 3 67. On rehearing, we now affirm the decision of the appellate court.

ANALYSIS

The State of Illinois, as a sovereign, has the inherent right to condemn property, subject to the state constitutional mandate that private property shall not be taken or damaged for public use without just compensation to its owner. Ill. Const. 1970, art. I, § 15; *Forest Preserve District v. West Suburban Bank,* 161 Ill. 2d 448, 455 (1994). The fifth amendment to the United

States Constitution (U.S. Const., amend. V), made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV), also provides that private property shall not be taken for public use without just compensation. *Hawaii Housing Authority v. Midkiff*, 467 U. S. 229, 231, 81 L. Ed. 2d 186, 191, 104 S. Ct. 2321, 2324 (1984).

In this case, we determine whether this taking achieves a legitimate public use pursuant to the constitutionally exercised police power of the government *(Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954)) and, therefore, whether eminent domain powers authorized by the State of Illinois were improperly exercised in the taking of private property from one private entity for the benefit and use of another private entity.

The right of a sovereign to condemn private property is limited to takings for a public use. U.S. Const., amend. V, Ill. Const. 1970, art. I, § 15; *Gaylord v. Sanitary District,* 204 Ill. 576, 588 (1903), Clearly, private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose. *Hawaii Housing Authority*, 467 U.S. at 243-44, 81 L, Ed. 2d at 199, 104 S. Ct. at 2331. However, that principle alone cannot adequately resolve the issues presented in this case. "Before the right of eminent domain may be exercised, the law, beyond a doubt, requires that the use for which the land is taken shall be public as distinguished from a private use." *People ex rel. Tuohy v. City of Chicago,* 394 Ill. 477, 481 (1946).

SWIDA's action in taking NCE's property and transferring it to Gateway for Gateway's private use presents fundamental constitutional issues that are essen-

tial to resolving this dispute. The essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.

It may be impossible to clearly delineate the boundary between what constitutes a legitimate public purpose and a private benefit with no sufficient, legitimate public purpose to support it. "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102. "While, from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning." *Tuohy*, 394 Ill. at 481. Great deference should be afforded the legislature and its granting of eminent domain authority. *Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102; *Old Dominion Land Co. v. United States,* 269 U.S. 55, 66, 70 L. Ed. 162, 165, 46 S. Ct. 39, 40 (1925) *United States ex rel. Tennessee Valley Authority v. Welch,* 327 U.S. 546, 552, 90 L. Ed. 843, 848, 66 S. Ct. 715, 718 (1946). However, the exercise of that power is not entirely beyond judicial scrutiny (see *Hawaii Housing Authority,* 467 U.S. at 241, 81 L. Ed. 2d at 197, 104 S. Ct. at 2329 (and cases cited therein)), and it is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question. "Courts all agree that the determination of whether a given use is a public use is a judicial function." *Tuohy,* 394 Ill. at 481.

SWIDA contends that the condemnation and taking

of NCE's property is sustainable because a public purpose will be served through (1) the fostering of economic development, (2) the promotion of public safety, and (3) the prevention or elimination of blight. Moreover, once the determination is made that one or all of these requirements is satisfied, "possesory use by the public is not an indispensable prerequisite to the lawful exercise of the power of eminent domain." *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539, 544-45 (1954).

SWIDA contends that any distinction between the terms "public purpose" and "public use" has long since evaporated and that the proper test is simply to ask whether a "public purpose" is served by the taking. While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case. We agree that these terms are necessarily somewhat loosely defined. However, that does not mean they are indistinguishable. The term " ' [p]ublic purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution." *People ex rel. Adamowski v. Chicago R.R. Terminal Authority,* 14 Ill. 2d 230, 236 (1958) (citing *People ex rel. Gutknecht v. Chicago Regional Part District,* 4 Ill. 2d 363 (1954), *Grasse v. Dealer's Transport Co.,* 412 Ill 179 (1952), *People v. Chicago Transit Authority,* 392 Ill. 77 (1945), and *People ex rel. Greening* v. *Bartholf,* 388 Ill, 445 (1944)). However, this flexibility does not equate to unfettered ability to exercise takings beyond constitutional boundaries. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Ha-*

waii Housing Authority, 467 U.S. at 245, 81 L. Ed. 2d at 200, 104 S. Ct. at 2331. As this court held in *Gaylord*, 204 Ill. at 584, "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."

Clearly, the taking of slums and blighted areas is permitted for the purposes of clearance and redevelopment, regardless of the subsequent use of the property. See, *e.g., Village of Wheeling v. Exchange National Bank of Chicago,* 213 Ill. App. 3d 325 (1991), *City of Chicago v. Gorham,* 80 Ill. App. 3d 496 (1980); *City of Chicago v. Walker,* 50 Ill. 2d 69 (1971). However, this proposition and the cases supporting it are of little assistance in this instance, as we are not dealing with a taking for the purposes of eliminating slums or blight.

If this taking were allowed to stand, it may be true that spectators at Gateway would benefit greatly. Developing additional parking could benefit the members of the public who choose to attend events at the racetrack as spectators may often have to wait in long lines of traffic to park their vehicles and again to depart the facility. We also acknowledge that a public use or purpose may be satisfied in light of public safety concerns. See *Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n* 16 Ill. 2d 539 (1959). The public is allowed to park on the property in exchange for the payment of a fee. Gateway's racetrack may be open to the public, but not "by right." *Gaylord*, 204 Ill. at 584. It is a private venture designed to result not in a public use, but in private profits. If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner. However, we are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its

existing property.

We have also recognized that economic development is an important public purpose. See *People ex rel. City of Canton v. Crouch,* 79 Ill. 2d 356 (1980); *People ex rel. City of Urbana v. Paley,* 68 Ill. 2d 62 (1977); *People ex rel. City of Salem v, McMackin,* 53 Ill. 2d 347 (1972). SWIDA presented extensive testimony that expandng Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region. However, "incidentally, every lawful business does this." *Gaylord,* 204 Ill. at 586. Moreover, nearly a century ago, *Gaylord* expressed the longstanding rule that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." *Gaylord,* 204 Ill. at 584.

This case is strikingly similar to our earlier decision in *Limits Industrial R.R. Co. v. American Spiral Pipe Works,* 321 Ill. 101 (1926). In *Limits Industrial,* this court held that a railroad could not exercise eminent domain authority to acquire property for the purpose of expanding its facilities. Despite a certificate of convenience and necessity issued by the Illinois Commerce Commission, we found the proposed spur track and public freight house provided minimal public benefit and principally benefitted the railroad itself and a few other business entities. Limits Industrial, 321 Ill. at 109-10. Similarly, it is incumbent upon us to question SWIDA's findings as to the parking situation at Gateway and determine whether the true beneficiaries of this taking are private businesses and not the public.

We do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose. As was the case in *Limits Industrial,* members of the public are not

the primary intended beneficiaries of this taking, *Limits Industrial,* 321 Ill. at 109-10. This condemnation clearly was intended to assist Gateway in accomplishing their goals in a swift, economical, and profitable manner.

Entities such as SWIDA must always be mindful of expediency, cost efficiency, and profitability while accepting the legislature's charge to promote development within their defined parameters. However, these goals must not be allowed to overshadow the constitutional principles that lie at the heart of the power with which SWIDA and similar entities have been entrusted. As Justice Kuehn stated in dissent in the appellate court, "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain." 304 Ill. App. 3d at 556 (Kuehn, J., specially concurring).

While the activities here were undertaken in the guise of carrying out its legislated mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack. SWIDA advertised that, for a fee, it would condemn land at the request of "private developers" for the " private use" of developers. In addition, SWIDA entered into a contract with Gateway to condemn whatever land "may be desired *** by Gateway." Clearly, the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals

through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default broker of land for Gateway's proposed parking plan.

This point is further emphasized by the fact that other options were available to Gateway that could have addressed many of the problems testified to by Pritchett, Ortbals and others. Gateway could have built a parking garage structure on its existing property rather than develop the land owned by NCE. However, when Gateway discovered that the cost of constructing a garage on land it already owned was substantially higher than using SWIDA as its agent to take NCE's property for open-field parking, Gateway chose the easier and less expensive avenue.

As a result of the acquisition of NCE's property, Gateway could realize an estimated increase of $13 to $14 million in projected revenue per year. While we do not deny that this expansion in revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow Gateway to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

The legislature intended that SWIDA actively foster economic development and expansion in Madison and St. Clair Counties. 70 ILCS 520/2(g), 5 (West 1998). However, the actions of SWIDA in this case blur the lines between a public use and a private purpose. A highway toll authority may justify the use of eminent domain to ensure that motorists have reasonable ac-

cess to gas stations, *Illinois Toll Highway Comm'n* 16 Ill. 2d at 546. Does the highway authority's power include the ability to use eminent domain authority to take additional land for a car wash, and then a lube shop? Could the authority then use its power to facilitate additional expansions for a motel, small retail shops, and entertainment centers? The initial, legitimate development of a public project does not justify condemnation for any and all related business expansions.

SWIDA contends that the "wisdom *** of the legislation and 'the means of executing the project' are beyond judicial scrutiny 'once the public purpose has been established.' It is that purpose which controls and not the "means' or mechanics' of how the purpose is carried out." We disagree. The Constitution and the essential liberties we are sworn to protect control. In its wisdom, the legislature has given SWIDA the authority to use eminent domain power to encourage private enterprise and become involved in commercial projects that may benefit a specific region of this state. While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, "the government does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, 73 L. Ed. 2d 868, 885, 102 S. Ct. 3164, 3178 (1982). The power of eminent domain is to be exercised with restraint, not abandon.

CONCLUSION

Accordingly, we agree with the appellate court's finding that, in this case, SWIDA exceeded its constitutional authority in taking NCE's land by eminent domain. The judgment of the appellate court is therefore affirmed.

Affirmed

JUSTICE FREEMAN, dissenting:

The majority holds that the Southwestern Illinois Development Authority (SWIDA) may not use the power of eminent domain to take real property owned by National City Environmental, L.L.C ., and St. Louis Auto Shredding Company (collectively NCE), and convey same to Gateway International Motorsports Corporation (Gateway). Because I believe the taking at issue is for a public use, and in furtherance of the purposes for which SWIDA was created, I respectfully dissent.

BACKGROUND

I agree with that portion of the majority's statement of facts setting forth the procedural posture of this case. I also agree with that portion of the statement of facts outlining the creation of SWIDA, the purposes of SWIDA, and the issuance of bonds by SWIDA to finance the costs of acquiring, constructing and installing a multipurpose automotive sports and training facility in the City of Madison. As to the balance of the statement of facts, I find that it contains conclusions unfairly slanted toward the result the majority desires to reach. Additionally, the majority omits certain facts adduced at trial which outline the reasons for the taking, and support the conclusion reached by the circuit court. I believe the reader of this opinion may benefit from a more complete rendition of the evidence in the record.

In June 1996, SWIDA issued $21.5 million in taxable sports facility revenue bonds. Gateway used the proceeds from the bonds to acquire a small racetrack and transform it into a racing and training facility capable of hosting major race car events. In 1997, the racetrack had 25,000 grandstand seats and 25,000 portable seats. The racetrack hosted three major events and a number of smaller events, with total attendance of 400,000. In 1998, Gateway increased seating capacity and hosted

four major events at the racetrack. Gateway's goal is to increase seating capacity in increments to the point where the racetrack has the 85,000 to 100,000 seats needed to host a Winston Cup NASCAR event.

On February 20, 1998, Gateway requested that SWIDA use its quick-take eminent domain powers to acquire a 148.5 acre tract of land (the Property) west of the racetrack for parking. Gateway asked SWIDA to acquire the Property from its owner, NCE, and convey it to Gateway. Gateway paid an application fee of $2,500 to SWIDA, and the sum of $10,000 to be applied toward SWIDA's sliding scale fee of 6% to 10% of the acquisition price of property being condemned. Gateway also agreed to pay SWIDA's out-of-pocket expenses or other costs associated with the quick-take process, including the acquisition price of the Property. Members of SWIDA's board are not entitled to compensation (70 ILCS 520/4(c) (West 1998)) and did not receive any part of these fees.

On February 23, 1998, the St. Clair County board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain powers to acquire the Property for use by Gateway for racetrack parking. See 70 ILCS 520/8(b) (West 1998) (requiring the approval of the county board before SWIDA can use its quick-take eminent domain powers within the unincorporated areas of a county). The board noted that attendance at the racetrack was expected to increase from 400,000 in 1997 to 600,000 in 1998, and that other development projects in the area would reduce available racetrack parking by 100 acres. The board found that it was necessary to create additional parking areas to safety and adequately service the spectators who would be attending events at the racetrack during 1998 and in subsequent years. Further, the board found that expansion of the racetrack would enhance the public

health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in St. Clair County and generating additional tax revenues.

Upon receipt of the St. Clair County board resolution, SWIDA held a public hearing on March 5, 1998, with notice given to NCE and adjacent property owners. Ray Reott, an attorney representing NCE, attended the meeting and voiced NCE's objections to the proposed taking. At the meeting, SWIDA adopted a resolution to assist the expansion of the racetrack (the Development Project) through the acquisition of the Property. SWIDA found that the Development Project would enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. SWIDA also found that the Property was integral to the success of the Development Project and authorized its executive director to take all necessary and appropriate actions, including negotiations and commencement of quick-take eminent domain proceedings, to acquire title to the Property. Further, SWIDA authorized its chairman or vice-chairman to execute an agreement between SWIDA and Gateway for acquisition of the Property through the use of quick-take eminent domain proceedings and conveyance of the Property to Gateway in furtherance of the Development Project.

Alan Ortbals, SWIDA's executive director, attended a meeting in Chicago on March 17, 1998, in an attempt to acquire the Property through negotiations, At the meeting, Gateway delivered a written offer to NCE to purchase the Property for $1 million. By letter dated March 19, 1998, NCE rejected the offer, but indicated its willingness to meet the week of March 30, 1998,

when NCE expected to have a completed appraisal of the Property. In a separate letter to SWIDA, NCE requested that SWIDA forward copies of any appraisals of the Property in its possession by March 25, 1998. SWIDA complied with this request.

On March 20,1998, SWIDA made a written offer to NCE to purchase the Property for $1 million, and advised NCE that it would initiate condemnation proceedings if NCE did not accept the offer by 5:00 p.m. on March 30,1998. SWIDA also attempted to follow through with the suggestion in NCE's letter of March 19, 1998, that the parties meet the week of March 30, 1998. On March 30, 1998, Harry Sterling, SWIDA's attorney, and Ortbals attempted to place a conference call to Reott. Reott was not available and failed to return the telephone call.

NCE did not respond to SWIDA's offer by the stated deadline. Instead, by letter dated April 20, 1998, NCE indicated that it did not feel that it was necessary to respond to SWIDA's offer because SWIDA knew that NCE had rejected Gateway's offer to purchase the Property for the identical sum of $1 million. However, to remove any uncertainty on the subject, NCE indicated that it was rejecting SWIDA's offer.

Meanwhile, on March 31, 1998, SWIDA filed a complaint for condemnation in the circuit court of St. Clair County, seeking to acquire fee simple title to the Property, SWIDA also filed a motion for immediate vesting of title and requested that the court fix a date for a quick-take hearing, pursuant to the quick-take provisions of the Code of Civil Procedure. See 735 ILCS 5/7-103, 7-104 (West 1998).

Also on March 31, 1998, NCE filed a motion to dismiss the complaint for condemnation. Subsequently, on April 2, 1998, NCE filed a traverse and motion to

dismiss, arguing that the proposed taking was for an unconstitutional private use; that the proposed taking was excessive; that the racetrack did not need additional parking; and that SWIDA had not made a good faith attempt to agree with NCE on an acceptable purchase price. NCE also filed a motion to strike SWIDA's request for immediate vesting of title. The circuit court denied NCE's motion to dismiss and motion to strike SWIDA's request for immediate vesting of title.

The court proceeded to hold a quick-take hearing. At the hearing, John Baricevic, St. Clair County board chairman, testified that the Property is located in unincorporated St. Clair County, and that the board adopted a resolution authorizing SWIDA to exercise its quick-take eminent domain powers to acquire the Property. Baricevic also testified that certain economic studies were done in connection with the bond issue and Gateway's acquisition of the racetrack. These studies showed the projected economic impact from the development of the racetrack and from increased attendance as the racetrack expands. No specific studies were made regarding the impact of the proposed taking on tax revenues or the tax base.

Alan Ortbals testified regarding the economic and traffic impact of the racetrack on the surrounding area. Ortbals stated that the racetrack hosted more major races and drew more spectators in 1997 than anticipated in studies performed prior to the development of the racetrack. The racetrack had added 10,000 seats and was ahead of projections for attendance in 1998. As a result, the county was experiencing faster economic spin-off than anticipated. A truck stop across from the racetrack was undergoing expansion; a parcel of land across from the racetrack sold for development of a restaurant; and a golf course was being developed on

the site of a former junk yard. In addition, several hotels and restaurants were being developed in the immediate area of the racetrack and in nearby municipalities

Due to the success of the racetrack, the county was experiencing serious traffic problems on race days with traffic backed up on both sides of Interstate 55-70. A number of racetrack patrons parked east of Illinois Route 203, creating traffic safety problems as they crossed Illinois Route 203 to gain access to the racetrack. Using the Property for racetrack parking would alleviate both of these traffic problems.

Ortbals also testified that when Gateway approached SWIDA regarding the Property, he reviewed the studies that were done in connection with the financing of the racetrack, including an analysis of Gateway's business plan, an analysis of the economic impact of the racetrack, an analysis of the traffic impact of the racetrack, and a market demand study. He also reviewed an analysis of the economic impact of a similar racetrack in Topeka, Kansas. He presented a report to SWIDA board members regarding these studies. In Ortbals' opinion as an expert in the field of economic development, SWIDA's acquisition of the Property by quicktake was necessary to promote economic development, alleviate traffic safety problems, and eliminate blight.

On cross-examination, Ortbals testified that SWIDA did not commission any studies analyzing the effect of the condemnation of the Property on employment levels, the tax base of St. Clair County, or traffic safety problems. Ortbals admitted that there were no slums on the Property. However, the development of the racetrack has had an indirect effect on the elimination of blight in the area. The golf course replaced an old junk yard and three or four dilapidated and abandoned

homes on Bend Road have been demolished.

Mike Pritchett, a design and planning engineer employed by the Illinois Department of Transportation (the Department), testified as an expert in the field of civil engineering. He stated that the Department was working with Gateway to find a traffic plan that would move traffic in and out of the racetrack efficiently, with minimal impact on the state and interstate highways. To that end, the Department has studied the traffic patterns occurring around the racetrack. On days of major events, there were significant backups on Interstate 55-70, extending into Missouri. Because the interstate was designed to facilitate travel at high speeds, drivers do not anticipate that cars will be stopped in traffic on the interstate. Stopped traffic on the interstate is thus a safety hazard.

Pritchett also testified that large numbers of racetrack patrons crossed Illinois Route 203 from the parking areas east of the highway to the racetrack. Illinois State Police troopers operate a traffic signal at Ohio Street and Illinois Route 203 manually to allow racetrack patrons to cross the highway. However, the traffic backed up at the signal had negative repercussions on Interstate 55-70. Furthermore, many racetrack patrons crossed at random locations along the highway. When the Department put a fence along Illinois Route 203 to try to channel racetrack patrons to Ohio Street, they pushed the fence down to cross the highway. Although no accidents had yet occurred, there was no assurance that none would.

Pritchett testified further that the Department had improved Illinois Route 203 to help the flow of traffic in and out of the racetrack. These improvements were based on a traffic impact study conducted in 1996, which assumed a considerable amount of parking west

of the racetrack. Construction of a parking lot on the Property would provide parking west of the racetrack, as suggested in the study, and alleviate traffic problems on race days. Pritchett concluded that it was necessary, from a safety standpoint, for SWIDA to acquire the Property for development of a parking lot.

On cross-examination, Pritchett testified that taking the Property would not solve all the traffic problems in the area. Some racetrack patrons would continue to park east of Illinois Route 203 and cross the highway to gain access to the racetrack. And if the racetrack was able to host a Winston Cup race, the traffic jams in the area would increase. However, construction of a parking lot on the Property was one of several measures the Department was considering to provide additional access to the racetrack and case the pressure on Illinois Route 203.

The mayor of the City of Madison testified that the racetrack had brought new jobs to the city and increased revenues from sales and entertainment taxes. He attributed the development of the golf course to the racetrack and testified that several developers were negotiating plans with the city to develop motels and restaurants in the area. He also testified regarding the traffic problems on race days and stated that it would be beneficial to have parking on the Property.

The president of the Village of Fairmont City attributed the development of an 86-room hotel in the village to the racetrack. He testified that continued growth of the racetrack was in the best economic interest of the village.

The president of the Southwestern Illinois Tourism and Convention Bureau, a not-for-profit corporation representing eight southwestern Illinois counties, testified that tourism was the second largest industry in the area. He estimated that in 1997 tourism added

between $520 million and $530 million to the economies of the eight counties, with the economic impact of the racetrack being $43.4 million. He also testified that, since January 1, 1996, in excess of 30 hotels had been built, were under construction, or were slated for construction in the area. The racetrack was a major contributing factor to the construction and proposed development of the hotels.

Scott Harding, a consulting engineer, performed an offsite evaluation of the Property. He testified that approximately 27 to 48 acres of the Property constitute wetlands. A developer who proposes to drain and build on an area that has been designated a wetland must first obtain a permit from the United States Army Corps of Engineers, listing conditions that must be met to minimize impact on the wetland, or steps, such as compensation, that must be taken in mitigation. Compensation involves replacing wetland that is used in a project with wetland that is created on another part of the same site or on a different site. Harding testified that Corps of Engineers policies call for compensation ratios of three to one for wooded wetlands, two to one for wetlands with scrub shrub, one and a half to one for emergent wetlands and one to one for farm wetlands. The Corps of Engineers may determine that certain high quality wetlands should not be impacted at all.

Based upon the types of wetland found on the Property, Harding estimated that the Corps of Engineers would require two to one compensation, that is, for every acre of wetland impacted by construction, the Corps of Engineer would require that Gateway create or construct two acres of wetlands. Thus, assuming that Gateway impacted 48 acres of wetlands and compensated on site, approximately 50 acres of land would remain for development.

Rod Wolter, Gateway's president and general manager, testified that all the major events at the racetrack were sold out in 1997. Total attendance at the racetrack that year was 400,000. The racetrack's schedule for 1998 listed more events than in 1997. In addition, the racetrack expected sell-out crowds at the major events in 1998. Attendance at those events would be greater than in 1997 because of increased seating capacity at the racetrack.

On cross-examination, Wolter testified that the racetrack had an immediate need for 2,000 to 5,000 parking spaces. The racetrack can park 2,000 cars on as little as 20 acres, and 5,000 cars on as little as 49 acres. The racetrack could get through the 1998 season without the Property, using remote parking areas. On redirect, Wolter testified that it was not in the racetrack's best interest to "get by" with parking. Lack of adequate parking could result in faltering attendance at the racetrack.

Christopher Pook, the CEO of Grand Prix, testified that Gateway added 10,000 seats to the racetrack in the spring of 1998 and planned to add another 20,000 seats in the fall. He also testified that, in order to obtain a contract to host a NASCAR Winston Cup event, Gateway would have to increase seating capacity to a minimum of 85,000 seats and have adequate parking in place. Gateway has considered building a raised parking garage at the racetrack. However, building such a garage was not economically feasible.

Pook testified next regarding several unsuccessful attempts, starting in May 1995, to reach an agreement with NCE for the use or purchase of the Property. Irv Pielet, one of NCE's owners, told him repeatedly that NCE was not interested in selling the Property or in any business relationship with Gateway. Pook also testified

that two nearby landowners had notified Gateway that 30 acres of land previously used for parking would no longer be available.

Roger Bowler, the plant manager for St. Louis Auto Shredding Company, testified that the plant employed 80 people on a full-time basis. During periods of peak activity, the plant hired additional employees on a part-time basis. On an annual basis, the plant recycled 90,000 to 100,000 cars, recovering metals from the cars for shipment to foundries, steel mills and smelters, and depositing other materials in a landfill operated by the plant. Bowler also testified that the current landfill would be capped in five to eight years and NCE planned to use the Property as its new landfill.

In lieu of personal testimony, the circuit court admitted into evidence Irv Pielet's discovery deposition. Pielet stated that Pook was interested in some part of NCE's land for a business venture, but he denied that Pook spoke to him about purchasing the Property. Pielet claimed that he learned of Gateway's interest in the Property from a newspaper account of the St. Clair County board's resolution.

Pielet stated further that the NCE's current landfill had less than 10 years of capacity remaining. However, no studies had been done of the landfill's capacity and 11 acres of the landfill had not yet been used. Pielet also stated that NCE had taken dirt once from the Property to cover a portion of the current landfill. NCE planned to take more dirt from the Property as needed to cover the section of the landfill the auto recycling plant was currently using. Lastly, Pielet indicated that the Property has 9.2 acres of wetlands.

At the conclusion of the quick-take hearing, the circuit court approved the condemnation. The court found that the taking was for a public purpose, refer-

ring specifically to Pritchett's testimony regarding public safety and Ortbals' testimony regarding public safety, economic development and the elimination of blight. The court also found, in light of the testimony regarding wetlands and testimony that parking west of the racetrack would promote public safety, that the taking was not excessive. Further, the court found that Pielet had been unwilling to negotiate in a meaningful fashion and the use of quick-take procedures was necessary to avert any negative economic impact to the people of Madison and St. Clair Counties. Finally, the court found that the SWIDA had bargained for the Property in good faith; NCE's failure to reject SWIDA's offer in a timely manner or to present a counteroffer was dispositive of this issue

ANALYSIS

A. Public Use

The majority recognizes that the State, as a sovereign, has the inherent right to condemn property, subject to the constitutional mandate that private property may not be taken or damaged for public use without just compensation to the owner. See slip op. at 7. Further, the majority recognizes that the subsequent transfer of property to a private entity does not transform a taking for public use into a taking for private use. See slip op. at 8. The majority correctly cites *Hawaii Housing Authority v. Midkiff,* 467 U. S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), and *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), for these propositions. However, *Hawaii Housing Authority* and *Berman* provide additional guidance in this area of law, which the majority fails to acknowledge. Contrary to the holdings of *Hawaii Housing Authority* and *Berman,* the majority gives little deference to the legislature's public use determination, Further, the majority en-

grafts upon *Hawaii Housing Authority* and *Berman a* requirement that property taken by eminent domain be put into use for the public, a proposition specifically rejected by the Court in *Hawaii Housing Authority*. See *Hawaii Housing Authority*, 467 U.S. at 243-44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331. Today's opinion is not an accurate rendition of the holdings of *Hawaii Housing Authority* and *Berman* and of the principles of law involved in this area.

In *Berman,* 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98, the Supreme Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 (60 Stat. 790, D.C. Code §§5-701 through 5-719 (1951)). That act provided for the use of eminent domain to acquire property in slums and blighted areas and for the lease or sale of the property to private interests for redevelopment pursuant to a comprehensive redevelopment plan. The appellants argued that their property could not be taken constitutionally because the property was commercial, not residential property; the property was not slum housing; the property would be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. The Court considered first whether the takings authorized by the act were for a public use, stating:

"The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. [Citation.] We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific

constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation] or the States legislating concerning local affairs. [Citations.] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Berman,* 348 U. S. at 31-32, 99 L. Ed, at 37, 75 S. Ct. at 102

The Court then rejected the appellants' contention that their property was being taken for a private use because the property would be transferred to a private individual or company, stating:

"Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [Citations.] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. [Citations.] The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude." *Berman,* 348 U.S. at 33-34, 99 L. Ed. at 38, 75 S. Ct. at 103.

In *Hawaii Housing Authority,* 467 U.S. at 240, 81 L.

Ed. 2d at 197, 104 S. Ct. at 2329, the Supreme Court explained that the public use principle is "coterminous with the scope of a sovereign's police powers." The Court also explained the role of the judiciary in reviewing a legislature's public use determination:

"There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. (Citation.] The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States,* 269 U. S. - 55, 66 (1925), which held that deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' The *Berman* Court also cited to *United States ex rel. TVA v. Welch, 327 U.S.* 546, 552 (1946), which emphasized that '[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' [Citation.]

[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Authority,* 467 U.S. at 240-41, 81 L. Ed, 2d at 197-98, 104 S. Ct. at 2329-30.

See also *National R. R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 422, 118 L. Ed. 2d 52, 69, 112

S. Ct. 1394, 1404 (1992).

Additionally, the Court reaffirmed the principle outlined in *Berman* that a taking for a public use is not transformed into a private taking through a subsequent transfer to a private party. The Court stated:

"The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [Citation.] '[W]hat in its immediate aspect [is] only a private transaction may., ... be raised by its class or character to a public affair.' *** [G]overnment does not itself have to use property to legitimate the taking, it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Hawaii Housing Authority,* 467 U.S. at 243 44, 81 L. Ed. 2d at 199, 104 S. Ct, at 2331.

This court has, heretofore, been guided by the principles outlined in *Berman.* Thus, in *People ex rel. Adamowski v. Chicago R.R. Terminal Authority,* 14 Ill. 2d 230 (1958), this court held constitutional the Railroad Terminal Authority Act (Ill. Rev. Stat. 1957, ch. 114, pars. 361 through 389). This court noted that the plaintiff's basic objection was that the principal beneficiaries of the act were private corporations. This court stated:

"To the extent that plaintiff's contentions are directed to an alleged absence of public use and public purpose, they are without merit. The General Assembly has described in considerable detail the conditions

which the act is designed to eliminate and has declared the public use and public interest that it found to exist. Such a legislative declaration is not to be lightly set aside. [Citations.] 'Public purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution. [Citations.]

"The primary objects of the statute are the removal of the blighted conditions caused by antiquated terminal areas, the promotion of the growth and development of the city and the relief of traffic congestion * * . [Citations.] It may be that private railroad corporations will derive some benefit under the act. Those benefits, however, will be incidental to the principal purpose of the statute**." *Adamowski*, 14 Ill. 2d at 235-36.

In *Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n,* 16 Ill. 2d 539, 541 (1959), the Illinois Toll Highway Commission sought to acquire an underground easement for sewer and water facilities through the defendants' cemetery property. The defendants objected that the property was being taken to service a gasoline station to be operated by a private corporation and to service a privately owned restaurant. This court noted that the purpose of the toll highways was to provide fast, through traffic in a safe manner, and that it was necessary that gasoline service stations and restaurants be located on or in close proximity to the highway proper, thereby reducing a great number of entrances and exits to reach these services. This court reasoned:

"As plaintiff points out, the operations of a gas station or a restaurant are specialized businesses, and are enterprises calling for experts in these fields, So the legislature wisely granted to the Commission the power

to make contracts with, and to grant concessions to, and to lease to persons and private corporations. As the court said in the case of *Berman v. Parker,* 348 U.S. 26, 99 L. ed. 27, at pages 33-34: 'The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.'

"We therefore conclude that service stations and restaurants are an integral part of the toll road system, whether they be operated by the Toll Highway Commission or leased to a private corporation who may be better able to carry on the business, thus bringing about the desired result. We think, further, that since access to sewer and water facilities is essential to the operation of service stations and restaurants, the reasoning which sustains the propriety of arrangements for the latter must uphold as well a reasonable exercise of condemnation powers in obtaining the former. The present exercise of the power has not been shown to be unreasonable under the circumstances ***." *Eden Cemetery Ass'n,* 16 Ill. 2d at 545-46.

See also *People ex rel.. City of Urbana v. Paley,* 68 Ill. 2d 62, 76 (1977) ("It is apparent that the city of Urbana intends to undertake the redevelopment in question primarily for the purpose of revitalizing an economically stagnant downtown area. The purpose of the project is therefore clearly and predominantly a public purpose, and the benefit reaped by private developers is merely an inevitable incident thereto"); *People ex rel. City of Salem v. McMackin,* 53 Ill. 2d 347, 355 (1972) ("While we acknowledge that there is a benefit to private interests in the financing of industrial projects under the Act, we hold that the principal purpose and objective of the Act is public in nature. Therefore, it does

not matter that there will be an incidental benefit to private interests"); *City of Chicago v. Barnes,* 30 Ill. 2d 255, 257 (1964) ("it does not follow that because the land may later be sold to a private developer its taking and clearance cannot have been for a public purpose").

Turning to the statute in the present case, I note that the legislature determined that "labor surplus areas currently exist in the southwestern part of the State" (70 ILCS 520/2(a) (West 1998)) and recognized that "the economic burdens resulting from involuntary unemployment fall in part upon the State in the form of increased need for public assistance and reduced tax revenues and, in the event that the unemployed worker and his family migrate elsewhere to find work, may also fall upon the municipalities and other taxing districts within the areas of unemployment in the form of reduced tax revenues, thereby endangering their financial ability to support necessary governmental services for their remaining inhabitants." 70 ILCS 520/2(b) (West 1998). The legislature also found "[t]that a lack of decent housing contributes to urban blight, crime, anti-social behavior, disease, a higher need for public assistance, reduced tax revenues, and the migration of workers and their families away from areas which fail to offer adequate, decent, affordable housing." 70 ILCS 520/2(d) (West 1998). Thus, the legislature described in detail the conditions the Act was designed to eliminate.

Further, the legislature declared that "decent, affordable housing" (70 ILCS 520/2(e) (West 1998)) and access to "educational institutions, recreation, parks and open spaces, entertainment and sports, a reliable transportation network, cultural facilities and theaters" (70 ILCS 520/2(f) (West 1998)) should be available to every citizen. The legislature also declared that "the State has a responsibility to help create a favorable climate for new and improved job opportunities for its

citizens by encouraging the development of commercial and service businesses and industrial and manufacturing plants within the southwestern part of the State." 70 ILCS 520/2(c) (West 1999). The legislature affirmed that "the main purpose of this Act is to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." 70 ILCS 520/2(g) (West 1998).

The legislature created SWIDA to promote development in Madison and St. Clair Counties. It charged SWIDA with the duty to assist in the development, construction and acquisition of industrial projects, housing or residential projects, and commercial projects including cultural facilities such as sports training facilities, racetracks, and parking facilities. 70 ILCS 52013, 520/6 (West 1999). In turn, SWIDA issued $21.5 million of bonds to facilitate the development of the racetrack. SWIDA now seeks to condemn the Property to further the development of the racetrack by increasing available parking. The development of parking facilities is both a project contemplated under the Act and part of the continued development of the racetrack.

This court has previously upheld the validity of legislative enactments designed to assist economic development (*People ex rel. City of Canton v. Crouch,* 79 Ill. 2d 356, 364 (1980); *Paley*. 68 Ill. 2d at 76; *McMackin,* 53 Ill. 2d at 358), to prevent or eliminate blight involving both structural infirmity and economic deterioration (*Paley*, 68 Ill. 24 at 74; *Barnes*, 30 Ill. 2d at 256, *People ex rel. Gutknecht v. City of Chicago*, Ill. 2d 539 545 (1954); *Chicago Land Clearance Comm'n v. White,* 411 Ill. 310, 316 (1952), *Cremer v. Peoria Housing Authority,* 399 Ill. 579, 588 *(1948); Zurn v. City of Chicago,*

389 Ill. 114, 128 (1945), and to promote public safety (*Eden Cemetery Ass'n,* 16 Ill. 2d at 544). See also *Adamowski*, 14 Ill. 2d at 236 (blighted conditions, promotion of the growth and development of the city and the relief of traffic congestion). Such legislative determinations air well within the State's police powers.

In the present case, the majority cannot dispute the legislative findings regarding the need to alleviate certain economic, housing and other conditions in the southwestern part of this state. Nor can the majority dispute that alleviation of these conditions furthers certain public purposes. The legislature is, after all, "the main guardian of the public needs to be served by social legislation." *Berman*, 348 US. at 31-32. 99 L. Ed. at 37, 75 S. Ct. at 102. And, the legislature has determined, as it well may, to use the power of eminent domain to realize its objective. See *Berman*, 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102. The legislature has vested in SWIDA the power of eminent domain so that SWIDA may assist in the development of housing, industrial and commercial projects in the area, The legislature has also given SWIDA the power to issue bonds to generate the financial wherewithal for the development of the projects. The means employed by the legislature to further the public purposes at issue are not irrational.

Applying the holdings of *Hawaii Housing Authority* and *Berman,* this court should defer to the legislative determination of the public use. Although the majority acknowledges that great deference is due the legislative determination (see slip op. at 9), the majority does not act in accordance with such deference. Indeed, the majority does not afford any measure of deference to the legislative determination.

The majority opinion is alarming both for its use of

selective portions of *Hawaii Housing Authority* and *Berman* and for its attempt to engraft an additional principle upon the public use doctrine. The majority states.

"A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void," *Hawaii Housing Authority*, 467 U.S. at 245, 81 L. Ed, 2d at 200, 104 S. Ct. at 233. As this court held in *Gaylord*, 204 Ill. at 584, '[t]he public must be to some extent entitled to use or enjoy the property, not as a more favor or by permission of the owner, but by right." Slip op. at 10.

The majority fails to acknowledge, however, that the Court in *Hawaii Housing Authority* specifically rejected a requirement that the property be put into use for the public.

"The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion,... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [Citation.] '[W]hat in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair .' * * * [G]overnment does not itself have to use property to legitimate the taking, it is only the takings's purpose and not its mechanics, that must pass scrutiny under the Public Use Clause." *Hawaii Housing Authority,* 467 U.S. at 243-44, 81 L. Ed. 2d at 199, 104 S. Ct. at 2331.

Not only is the majority disingenuous in its citation to *Hawaii Housing Authority* and *Berman* but it seeks to unravel the holdings of these opinions, for in imposing a requirement that the property be put into use for

the general public, the majority effectively interdicts any taking for the purpose of economic development.

I must inquire of the majority what development project can satisfy the requirement that the public be "entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right"? Can a member of the general public enter a manufacturing plant as of right? What of a sports facility? Can a member of the general public enter a stadium, or for that matter the racetrack at issue, without paying a fee for the privilege? The majority states,

"We also acknowledge that a public, use or purpose may be satisfied in light of public safety concerns. See *Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n,* 16 Ill. 2d 539 (1959). The public is allowed to park on the property in exchange for the payment of a fee. Gateway's racetrack may be open to the public, but not 'by right.'" Slip op. at 10-11.

Again, I ask what project will survive the majority's requirement of use as of right by the general public?

I suggest that, in its attempt to reach a particular result, the majority does great harm to the public use doctrine and to the interests of this state.

B. Particular Taking

The majority errs in other ways. In considering the taking at issue, the majority applies the wrong standard of review and ignores the evidence adduced at trial.

Section 7-104(b) of the Code of Civil Procedure provides in part:

"At the [quick-take] hearing, if the court has not previously, in the same proceeding, determined that

the plaintiff has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of such night, and that such fight is not being improperly exercised in the particular proceeding, then the court shall first hear and determine such matters." 735 ILCS 5/7-104(b) (West 1998).

A finding on each of these three issues amounts to a determination of whether or not the plaintiff has the right to take the property by eminent domain. See *Department of Public Works & Buildings v. Dust,* 19 Ill. 2d 217, 219 (1960). As this court noted in *Department of Transportation v. First Galesburg National Bank & Trust Co.,* 141 Ill. 2d 462, 468 (1990), the plaintiff has only such powers of eminent domain as are conferred upon it by the legislature. See also *Department of Public Works & Buildings v. Keller,* 61 Ill. 2d 320 (1975). The law conferring the right of eminent domain must be strictly construed. *First Galesburg National Bank,* 141 Ill. 2d at 469.

When a defendant files a motion to dismiss challenging the authority to condemn, the burden is on the condemning authority to make a *prima facie* case of the disputed allegations. *First Galesburg National Bank,* 141 Ill. 2d at 469; *Keller, 61 Ill. 2d at* 324. This burden may be met by introducing in evidence a statute affirming the authority's right to acquire property by eminent domain (see *First Galesburg National Bank,* 141 Ill. 2d at 469), or a resolution and ordinance approving the taking (see *City of Chicago v. Walker*, 50 Ill. 2d 69, 71 (1971)). Once the condemning authority has made a *prima facie* case, the defendant is required to go forward with evidence showing that there was an abuse of discretion by the condemning authority. *First Galesburg National Bank,* 141 Ill. 2d at 470; *Keller*, 61 Ill. 2d at 325. The courts will interfere only where an abuse of discretion is shown, for as this court has held many times:

"[W]hether the exercise of the power of eminent domain is necessary or expedient to accomplish an authorized purpose is not a question within the province of the court to determine. The agency on which the power has been conferred also has the authority to decide the necessity for its exercise. In the absence of a clear abuse of this authority the courts will not inquire into the necessity or the propriety of its exercise." *Keller*, 61 Ill. 2d at 325 (citing *Department of Public Works & Buildings v. McNeal,* 33 Ill. 2d 248 (1965), *Forest Preserve District v. Wike,* 3 Ill. 2d 49 (1954), *City of Chicago v. Vaccarro,* 408 Ill. 587 (1951), and *Zurn v. City of Chicago,* 389 Ill. 114 (1945)).

In the present case, SWIDA satisfied its *prima facie* burden of proof. Pursuant to section 8 of the Act, SWIDA may acquire real property, or rights therein, upon condemnation. 70 ILCS 520/8(b) (West 1998). Section 5 of the Act commands SWIDA to assist in the development of commercial projects, including racetracks and parking facilities. 70 ILCS 520/5 (West 1998). SWIDA introduced into evidence a resolution adopted by the St. Clair County board authorizing the acquisition of the Property by use of quick-take eminent domain. SWIDA also introduced into evidence a resolution it adopted to acquire the Property by quick-take eminent domain. The resolutions state that it is necessary to create additional parking areas for the racetrack to safely and adequately service racetrack spectators and that the acquisition of the Property for parking purposes will enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. This evidence suffices for a *prima facie* case.

It became incumbent upon NCE to introduce evi-

dence showing that SWIDA had abused its discretion. NCE failed in this undertaking. The evidence at the hearing fully supports the circuit court's determination that taking the Property will further economic development, promote safety, and lead to the elimination of blight in the area.

The majority disagrees. As to the elimination of blight, the majority simply states, "we are not dealing with a taking for the purposes of eliminating slums or blight." Slip op. at 10. Nothing is said of Ortbals' testimony on the subject.

The majority is more forthright on the subject of economic development. As the majority notes.

"SWIDA presented extensive testimony that expanding Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region." Slip op. at 11.

However, the majority quickly dispenses with this "extensive testimony" of economic development. The majority simply notes that " 'incidentally, every lawful business does this.' " Slip op. at 10, quoting *Gaylord v. Sanitary District,* 204 Ill. 576, 586 (1903).

The majority reluctantly acknowledges the evidence regarding public safety. The majority notes.

"If this taking were permitted, lines to enter parking lots might be shortened and pedestrians might be able to cross from parking areas to event areas in a safer manner." Slip op. at 11.

However, this acknowledgment fails to convey the full impact of the trial testimony regarding public safety. Pritchett testified that it was necessary, from a safety standpoint, for SWIDA to acquire the Property

for development of a parking lot. Ortbals testified that using the Property for racetrack parking would alleviate the traffic back-ups on Interstate 55-70 and allow racetrack patrons parked east of Illinois Route 203 to gain access to the racetrack safely.

Acknowledgment aside, the majority then rejects the evidence as to the traffic safety concerns. The majority states,

"[W]e are unpersuaded that these facts alone are sufficient to satisfy the public use requirement, especially in light of evidence that Gateway could have built a parking garage structure on its existing property." Slip op. at 11.

The majority's conclusion is not supported by the record. Wolter testified at trial that the racetrack had an immediate need for 2,000 to 5,000 parking spaces. Pook testified at trial that Gateway had considered building a raised parking garage at the racetrack. However, building such a garage was not economically feasible. NCE introduced no evidence that building a raised parking garage with 5,000 parking spaces was feasible, economically or otherwise. Given the number of parking spaces at issue and NCE's failure to present any evidence on this matter, the majority's conclusion demonstrates either a general misapprehension of the nature of appellate review or a deliberate choice to substitute the judgment of this court for the record and proper inferences to be drawn therefrom.

Moreover, in questioning the necessity of the taking, the majority applies the wrong standard of review. As noted above, this court has previously recognized that

"The agency on which the power has been conferred also has the authority to decide the necessity for its exercise. In the absence of a clear abuse of this author-

ity the courts will not inquire into the necessity or the propriety of its exercise." *Keller,* 61 Ill. 2d at 325 (citing *McNeal,* 33 111, 2d 248, *Wike,* 3 Ill. 2d 49, *Vaccarro,* 408 111, 587, and *Zurn,* 389 Ill. 114).

The legislature has vested in SWIDA the power of eminent domain to assist in the development of commercial projects including racetracks and parking facilities. The acquisition of the Property being in furtherance of three distinct public purposes, SWIDA did not abuse its discretion by the use of its eminent domain powers. The evidence at trial is not contrary and judicial intervention is unwarranted.

CONCLUSION

I agree with the circuit court that SWIDA properly exercised its power of eminent domain. The taking of the Property was for a public use, not a private use. The majority errs in its application of the standard of review. The majority also errs in its willingness to dispense with strong evidence at trial supporting the circuit court's decision. Lastly, the majority commits great disservice to the State of Illinois and its citizens in engrafting upon the public use doctrine the requirement that property taken by eminent domain must be accessible to the general public as of right. This requirement is the death of social legislation in furtherance of economic development and revitalization. I respectfully dissent.

JUSTICE McMORROW joins in this dissent.

APPENDIX B

FILED
APR 19 2001
SUPREME COURT OF ILLINOIS

Docket No. 87809
Agenda 18
May 2000

THE SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY,
Appellant,

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C., *et al.*,
Appellees.

JUSTICE FREEMAN delivered the opinion of the court:

At issue in the present case is whether the Southwestern Illinois Development Authority (the Authority) can use the power of eminent domain to take real property owned by National City Environmental, L.L.C., and St. Louis Auto Shredding Company (collectively NCE), and convey the property to Gateway International Motorsports Corporation (Gateway).

BACKGROUND

The Authority is a political subdivision, body politic and municipal corporation created by the Southwestern Illinois Development Authority Act (the Act) (70 ILCS 520/1 *et seq.* (West 1998) (formerly Ill. Rev. Stat. 1991, ch. 85, par. 6151 *et seq.*)). The stated purpose of the Act is "to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant

upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." 70 ILCS 520/2(g) (West 1998).

Pursuant to the Act, it is "the duty of the Authority to promote development within the geographic confines of Madison and St. Clair counties." 70 ILCS 520/5 (West 1998). The Act mandates that the Authority assist in the development, construction and acquisition of industrial, commercial, housing or residential projects within these counties. 70 ILCS 520/5 (West 1998). The Act defines a "[c]ommercial project" as "any cultural facilities of a for-profit or not-for-profit type including *** racetracks [and] parking facilities." 70 ILCS 520/36) (West 1998).

To accomplish the purposes of the Act, the legislature empowered the Authority to issue bonds for the purpose of acquiring improving or developing projects, including those established by business entities locating or expanding property within Madison and St. Clair Counties. 70 ILCS 520/7 (West 1998). The Act also confers upon the Authority the power to acquire real property by condemnation, and declares that "[t]he acquisition by eminent domain of such real property or any interest therein by the Authority shall be in the manner provided by the 'Code of Civil Procedure' [735 ILCS 511-101 *et seq.* (West 1999)], *** including Section 7-103 thereof [735 ILCS 5/7-103 (West 1998) (quick-take provision)].'" 70 ILCS 520/8(b) (West 1998).

In June 1996, the Authority issued $21.5 million in taxable sports facility revenue bonds. The Authority lent the proceeds of the bonds to Gateway to finance the costs of acquiring, constructing and installing a multi-purpose automotive sports and training facility in the City of Madison. Gateway signed a loan agreement and a note to evince its obligation to repay the loan. Addi-

tionally, payment of the principal of, and interest on, the note and the bonds are guaranteed by Grand Prix Association of Long Reach (Grand Prix) and Automotive Safety and Transportation Systems, Inc., companies related to Gateway. Although the bonds do not constitute an indebtedness of the Authority or of the state, they are a moral obligation of the state.

Gateway used the proceeds from the bonds to acquire a small racetrack and transform it into a racing and training facility capable of hosting major race car events. In 1997, the racetrack had 25,000 grandstand seats and 25,000 portable seats. The racetrack hosted three major events and a number of smaller events, with total attendance of 400,000. In 1998, Gateway increased seating capacity and hosted four major events at the racetrack. Gateway's goal is to increase seating capacity in increments to the point where the racetrack has the 85,000 to 100,000 seats needed to host a Winston Cup NASCAR event.

On February 20, 1998, Gateway requested that the Authority use its quick-take eminent domain powers to acquire a 148.5 acre tract of land (the Property) west of the racetrack for parking. Gateway asked the Authority to acquire the Property from its owner, NCE, and convey it to Gateway. Gateway paid an application fee of $2,500 to the Authority, and the sum of $ 10,000 to be applied toward the Authority's sliding scale fee of 6% to 10% of the acquisition price of property being condemned.

Gateway also agreed to pay the Authority's out-of-pocket expenses or other costs associated with the quick-take process, including the acquisition price of the Property. Members of the board of the Authority are not entitled to compensation (70 ILCS 520/4(c) (West 1998)), and did not receive any part of these fees.

On February 23, 1998, the St. Clair County board adopted a resolution authorizing the Authority to exercise its quick-take eminent domain powers to acquire the Property for use by Gateway for racetrack parking. See 70 ILCS 520/8(b) (West 1998) (requiring the approval of the county board before the Authority can use its quick-take eminent domain powers within the unincorporated areas of a county). The board noted that attendance at the racetrack was expected to increase from 400,000 in 1997 to 600,000 in 1998, and that other development projects in the area would reduce available racetrack parking by 100 acres. The board found that it was necessary to create additional parking areas to safely and adequately serve the spectators who would be attending events at the racetrack during 1998 and in subsequent years. Further, the board found that expansion of the racetrack would enhance the public health, safety, morals, happiness, and general welfare of the citizens of southwestern Illinois by increasing the tax base in St. Clair County and generating additional tax revenues.

Upon receipt of the St. Clair County board resolution, the Authority held a public hearing on March 5, 1998, with notice given to NCE and adjacent property owners. Ray Reott, an attorney representing NCE, attended the meeting and voiced NCE's objections to the proposed taking. At the meeting, the Authority adopted a resolution to assist the expansion of the racetrack (the Development Project) through the acquisition of the Property. The Authority found that the Development Project would enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. The Authority also found that the Property

was integral to the success of the Development Project, and authorized its executive director to take all necessary and appropriate actions, including negotiations and commencement of quick-take eminent domain proceedings, to acquire title to the Property. Further, the Authority authorized its chairman or vice-chairman to execute an agreement between the Authority and Gateway for acquisition of the Property through the use of quick-take eminent domain proceedings and conveyance of the Property to Gateway in furtherance of the Development Project.

Alan Ortbals, the Authority's executive director, attended a meeting in Chicago on March 17, 1998, in an attempt to acquire the Property through negotiations. At the meeting, Gateway delivered a written offer to NCE to purchase the Property for $1 million. By letter dated March 19, 1998, NCE rejected the offer, but indicated its willingness to meet the week of March 30, 1998, when NCE expected to have a completed appraisal of the Property. In a separate letter to the Authority, NCE requested that the Authority forward copies of any appraisals of the Property in its possession by March 25, 1998. The Authority complied with this request.

On March 20, 1998, the Authority made a written offer to NCE to purchase the Property for $1 million, and advised NCE that the Authority would initiate condemnation proceedings if NCE did not accept the offer by 5 p.m. on March 30, 1998. The Authority also attempted to follow through with the suggestion in NCE's letter of March 19, 1998, that the parties meet the week of March 30, 1998. On March 30, 1998, Harry Sterling, the Authority's attorney, and Ortbals attempted to place a conference call to Reott. Reott was not available and failed to return the telephone call.

NCE did not respond to the Authority's offer by the stated deadline. Instead, by letter dated April 20, 1998, NCE indicated that it did not feel that it was necessary to respond to the Authority's offer because the Authority knew that NCE had rejected Gateway's offer to purchase the Property for the identical sum of $1 million. However, to remove any uncertainty on the subject, NCE indicated that it was rejecting the Authority's offer. Meanwhile, on March 31, 1998, the Authority filed a complaint for condemnation in the circuit court of St. Clair County, seeking to acquire fee simple title to the Property. The Authority also filed a motion for immediate vesting of title, and requested that the court fix a date for a quick-take hearing, pursuant to the quick-take provisions of the Code of Civil Procedure. See 735 ILCS 5/7-103, 7-104 (West 1998).

Also on March 31, 1998, NCE filed a motion to dismiss the complaint for condemnation. Subsequently, on April 2,1998, NCE filed a traverse and motion to dismiss, arguing that the proposed taking was for an unconstitutional private use, that the proposed taking was excessive; that the racetrack did not need additional parking; and that the Authority had not made a good-faith attempt to agree with NCE on an acceptable purchase price. NCE also filed a motion to strike the Authority's request for immediate vesting of title. The circuit court denied NCE's motion to dismiss and motion to strike the Authority's request for immediate vesting of title.

The court proceeded to hold a quick-take hearing. At the hearing, John Baricevic, St. Clair County board chairman, testified that the Property is located in unincorporated St. Clair County, and that the board adopted a resolution authorizing the Authority to exercise its quick-take eminent domain powers to acquire

the Property. Baricevic also testified that certain economic studies were done in connection with the bond issue and Gateway's acquisition of the racetrack. These studies showed the projected economic impact from the development of the racetrack and from increased attendance as the racetrack expands. No specific studies were made regarding the impact of the proposed taking on tax revenues or the tax base.

Alan Ortbals testified regarding the economic and traffic impact of the racetrack on the surrounding area. Ortbals stated that the racetrack hosted more major races and drew more spectators in 1997 than anticipated in studies performed prior to the development of the racetrack. The racetrack had added 10,000 seats and was ahead of projections for attendance in 1998. As a result, the county was experiencing faster economic spin-off than anticipated. A truck stop across from the racetrack was undergoing expansion; a parcel of land across from the racetrack sold for development of a restaurant; and a golf course was being developed on the site of a former junk yard. In addition, several hotels and restaurants were being developed in the immediate area of the racetrack and in nearby municipalities.

Due to the success of the racetrack, the county was experiencing serious traffic problems on race days with traffic backed up on both sides of Interstate 55-70. A number of racetrack patrons parked east of Illinois Route 203, creating traffic safety problems as they crossed Illinois Route 203 to gain access to the racetrack. Using the Property for racetrack parking would alleviate both of these traffic problems.

Ortbals also testified that when Gateway approached the Authority regarding the Property, he reviewed the studies that were done in connection with the financing

of the racetrack, including an analysis of Gateway's business plan, an analysis of the economic impact of the racetrack, an analysis of the traffic impact of the racetrack, and a market demand study He also reviewed an analysis of the economic impact of a similar racetrack in Topeka, Kansas. He presented a report to the board of the Authority regarding these studies. In Ortbals' opinion as an expert in the field of economic development, the Authority's acquisition of the Property by quick-take was necessary to promote economic development, alleviate traffic safety problems, and eliminate blight.

On cross-examination, Ortbals testified that the Authority did not commission any studies analyzing the effect of the condemnation of the Property on employment levels, the tax base of St. Clair County, or traffic safety problems. Ortbals admitted that there were no slums on the Property. However, the development of the racetrack has had an indirect effect on the elimination of blight in the area. The golf course replaced an old junk yard, and three or four dilapidated and abandoned homes on Bend Road have been demolished.

Mike Pritchett, a design and planning engineer employed by the Illinois Department of Transportation (IDOT), testified as an expert in the field of civil engineering. He stated that IDOT was working with Gateway to find a traffic plan that would move traffic in and out of the racetrack efficiently, with minimal impact on the state and interstate highways. To that end, IDOT has studied the traffic patterns occurring around the racetrack. On days of major events, there were significant backups on interstate 55-70, extending into Missouri. Because the interstate was designed to facilitate travel at high speeds, drivers do not anticipate that cars will be stopped in traffic on the interstate. Stopped

traffic on the interstate is thus a safety hazard .

Pritchett also testified that large numbers of racetrack patrons crossed Illinois Route 203 from the parking areas east of the highway to the racetrack. Illinois State Police troopers operate a traffic signal at Ohio Street and Illinois Route 203 manually to allow racetrack patrons to cross the highway. However, the traffic backed up at the signal had negative repercussions on Interstate 55-70. Furthermore, many racetrack patrons crossed at random locations along the highway. When IDOT put a fence along Illinois Route 203 to try to channel racetrack patrons to Ohio Street, they pushed the fence down to cross the highway. Although no accidents had yet occurred, there was no assurance that none would.

Pritchett testified further that IDOT had improved Illinois Route 203 to help the flow of traffic in and out of the racetrack. These improvements were based on a traffic impact study conducted in 1996, which assumed a considerable amount of parking west of the racetrack. Construction of a parking lot on the Property would provide parking west of the racetrack, as suggested in the study, and alleviate traffic problems on race days. Pritchett concluded that it was necessary, from a safety standpoint, for the Authority to acquire the Property for development of a parking lot.

On cross-examination, Pritchett testified that taking the Property would not solve all the traffic problems in the area. Some racetrack patrons would continue to park east of Illinois Route 203 and cross the highway to gain access to the racetrack. And if the racetrack was able to host a Winston Cup race, the traffic jams in the area would increase. However, construction of a parking lot on the Property was one of several measures IDOT was considering to provide additional access to

the racetrack and ease the pressure on Illinois Route 203.

The mayor of the City of Madison testified that the racetrack had brought new jobs to the city and increased revenues, from sales and entertainment taxes. He attributed the development of the golf course to the racetrack, and testified that several developers were negotiating plans with the city to develop motels and restaurants in the area. He also testified regarding the traffic problems on race days, and stated that it would be beneficial to have parking on the Property.

The president of the Village of Fairmont City attributed the' development of an 86-room hotel in the village to the racetrack. He testified that continued growth of the racetrack was in the best economic interest of the village.

The president of the Southwestern Illinois Tourism and Convention Bureau, a not-for-profit corporation representing eight southwestern Illinois counties, testified that tourism was the second largest industry in the area. He estimated that in 1997 tourism added between $520 million and $530 million to the economies of the eight counties, with the economic impact of the racetrack being $43.4 million. He also testified that, since January 1, 1996, in excess of 30 hotels had been built, were under construction, or were slated for construction in the area. The racetrack was a major contributing factor to the construction and proposed development of the hotels.

Scott Harding, a consulting engineer, performed an offsite evaluation of the Property. He testified that approximately 27 to 48 acres of the Property constitute wetlands. A developer who proposes to drain and build on an area that has been designated a wetland must first obtain a permit from the United States Army

Corps of Engineers, listing conditions that must be met to minimize impact on the wetland, or steps, such as compensation, that must be taken in mitigation. Compensation involves replacing wetland that is used in a project with wetland that is created on another part of the same site or on a different site. Harding testified that Corps of Engineers policies call for compensation ratios of three to one for wooded wetlands, two to one for wetlands with scrub shrub, one and a half to one for emergent wetlands and one to one for farm wetlands. The Corps of Engineers may determine that certain high quality wetlands should not be impacted at all.

Based upon the types of wetland found on the Property, Harding estimated that the Corps of Engineers would require two to one compensation; that is, for every acre of wetland impacted by construction, the Corps of Engineer would require that Gateway create or construct two acres of wetlands. Thus, assuming that Gateway impacted 48 acres of wetlands and compensated on site, approximately 50 acres of land would remain for development.

Rod Wolter, Gateway's president and general manager, testified that all the major events at the racetrack were sold out in 1997. Total attendance at the racetrack that year was 400,000. The racetrack's schedule for 1998 listed more events than in 1997. In addition, the racetrack expected sell-out crowds at the major events in 1998. Attendance at those events would be greater than in 1997 because of increased seating capacity at the racetrack.

On cross-examination, Wolter testified that the racetrack had an immediate need for 2,000 to 5,000 parking spaces. The racetrack can park 2,000 cars on as little as 20 acres, and 5,000 cars on as little as 49 acres. The racetrack could get through the 1998 season without

the Property, using remote parking areas. On redirect, Wolter testified that it was not in the racetrack's best interest to "get by" with parking. Lack of adequate parking could result in faltering attendance at the racetrack.

Christopher Pook, the CEO of Grand Prix, testified that Gateway added 10,000 seats to the racetrack in the spring of 1998, and planned to add another 20,000 seats in the fall. He also testified that, in order to obtain a contract to host a NASCAR Winston Cup event, Gateway would have to increase seating capacity to a minimum of 85,000 seats and have adequate parking in place. Gateway has considered building a raised parking garage at the racetrack. However, building such a garage was not economically feasible.

Pook testified next regarding several unsuccessful attempts, starting in May 1995, to reach an agreement with NCE for the use or purchase of the Property. Irv Pielet, one of NCE's owners, told him repeatedly that NCE was not interested in selling the Property or in any business relationship with Gateway. Pook also testified that two nearby landowners had notified Gateway that 30 acres of land previously used for parking would no longer be available.

Roger Bowler, the plant manager for St. Louis Auto Shredding Company, testified that the plant employed 80 persons on a full-time basis. During periods of peak activity, the plant hired additional employees on a part-time basis. On an annual basis, the plant recycled 90,000 to 100,000 cars, recovering metals from the cars for shipment to foundries, steel mills and smelters, and depositing other materials in a landfill operated by the plant. Bowler also testified that the current landfill would be capped in five to eight years and NCE planned to use the Property as its new landfill.

In lieu of personal testimony, the circuit court admitted into evidence Irv Pielet's discovery deposition. Pielet stated that Pook was interested in some part of NCE's land for a business venture, but he denied that Pook spoke to him about purchasing the Property. Pielet claimed that he learned of Gateway's interest in the Property from a newspaper account of the St. Clair County board's resolution.

Pielet stated further that the NCE's current landfill had less than 10 years of capacity remaining. However, no studies had been done of the landfill's capacity and 11 acres of the landfill had not yet been used. Pielet also stated that NCE had taken dirt once from the Property to cover a portion of the current landfill. NCE planned to take more dirt from the Property as needed to cover the section of the landfill the auto recycling plant was currently using. Lastly, Pielet indicated that the Property has 9.2 acres of wetlands.

At the conclusion of the quick-take hearing, the circuit court approved the condemnation. The court found that the taking was for a public purpose, referring specifically to Pritchett's testimony regarding public safety and Ortbals' testimony regarding public safety, economic development and the elimination of blight. The court also found, in light of the testimony regarding wetlands and testimony that parking west of the racetrack would promote public safety, that the taking was not excessive. Further, the court found that Pielet had been unwilling to negotiate in a meaningful fashion and the use of quick-take procedures was necessary to avert any negative economic impact to the people of Madison and St. Clair Counties. Finally, the court found that the Authority had bargained for the Property in good faith; NCE's failure to reject the Authority's offer in a timely manner or to present a counteroffer was dispositive of this issue.

The circuit court denied NCE's oral motion for a stay (see 73 5 ILCS 5/7-104(b) (West 1998)) and proceeded to hear evidence of just compensation for the Property (see 735 ILCS 5/7-104(c) (West 1998)). Subsequently, the court made a preliminary finding that $900,000 constituted just compensation. Upon evidence presented to the court of payment of that amount, the court entered an order of taking, vesting in the Authority the fee simple title to the Property and authorizing immediate possession of the Property. See 735 ILCS 5/7-105(a) (West 1998). NCE filed an emergency motion for a stay of the transfer of title or, in the alternative, for an order requiring that the Authority post a bond of $38 million pending appeal. The circuit court denied the motion.

NCE filed an interlocutory appeal, pursuant to section 7-104 of the Code of Civil Procedure (735 ILCS 5/7-104(b) (West 1998)) and Supreme Court Rule 307(a)(7) (166 M. 2d 307(a)(7)), asserting that the Authority lacked the constitutional authority to take the Property and convey it to Gateway, amongst other issues. NCE also filed an emergency motion for a stay of the condemnation, which the court granted.

Citing *Southwestern Illinois Development Authority v. Vollman,* 235 Ill. App. 3d 32 (1992), the appellate court ruled that, in an interlocutory appeal pursuant to section 7-104(b) and Rule 307(a)(7), only three issues can be raised: (1) whether the plaintiff has the authority to exercise the right of eminent domain; (2) whether the property taken is subject to the exercise of such right; and (3) whether the right is being properly exercised in the proceeding. 304 Ill. App. 3d 542, 544; see also 735 ILCS 5/7-104(b) (West 1998).[1] The appel-

[1]The appellate court found that some issues raised by NCE were within the scope of the interlocutory appeal while others were not.

Continued on Next Page

late court then found that the Authority had the power to exercise the right of eminent domain and that the Property was subject to the exercise of such right. 304 Ill. App. 3d at 546. However, the appellate court held that the Authority did not properly exercise the right of eminent domain because the Authority sought to condemn the Property in order to convey it to Gateway. According to the appellate court, the condemnation was for a private use in violation of the constitutional limitation against taking private property by eminent domain except for public purposes, 304 Ill. App. 3d at 553. In light of this holding, the appellate court did not decide the other issues it had determined were properly raised in this interlocutory appeal.

The Authority filed a petition for leave to appeal pursuant to Supreme Court Rule 317 (134 Ill. 2d R. 317). We granted the Authority's petition and allowed the City of Chicago, Town of Normal, St. Clair County State's Attorney, Illinois Municipal League, Illinois Institute for Local Government Law, and Metro Counties Council to file an *amicus curiae* brief in support of the Authority (155 Ill. 2d R. 345). We also allowed the Illinois Agricultural Association, the Institute for Justice, the Heartland Institute, and Matthew Kassnel to file *amicus curiae* briefs in support of NCE.

ANALYSIS

A. Public Use

The State, as a sovereign, has the inherent right to condemn property, subject to our state constitutional

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Footnote 1 Continued

The court indicated that the issues which were not within the scope of the interlocutory appeal would be appealable at the conclusion of the eminent domain proceeding. NCE does not contest this ruling.

mandate that private property may not be taken or damaged for public use without just compensation to the owner. Ill. Const. 1970, art. I, §15; *Forest Preserve District v. West Suburban Bank,* 161 Ill. 2d 448, 455 (1994); *Department of Public Works & Buildings v. McNeal,* 33 Ill. 2d 248, 251 (1965). The fifth amendment to the United States Constitution (U.S. Const., amend. V), made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV), also provides that private property shall not be taken for public use, without just compensation. *Hawaii Housing Authority v. Midkiff,* 467 U.S, 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). In this case, the appellate court determined that the Authority had taken NCE's property for a private use, not a public use. Contrarily, the Authority maintains that the condemnation was for a public use. The Authority contends that the circuit court's finding that the condemnation served three separate public purposes, i.e., public safety, economic development, and the elimination of blight, was consistent with the evidence and the law. The Authority also maintains that a condemnation for a public purpose is not transformed into a condemnation for a private use merely because the condemning body transfers title, use or possession of the property to a private party to carry out the public purpose involved.

Our analysis of public use starts with *Berman v. Parker,* 348 U. S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954). In *Berman,* the United States Supreme Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945, §§5-701 through 5-719, 60 Stat. 790 (1951) (D.C. Code). That act provided for the use of eminent domain to acquire property in slums and blighted areas, and for the lease or sale of the property to private interests for redevelopment pursuant to a comprehensive redevelopment plan. The appellants

argued that their property could not be taken constitutionally because the property was commercial, not residential property; the property was not slum housing; the property would be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. The Court considered first whether the takings authorized by the act were for a public use, stating:

"The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. [Citation.] We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia [citation] or the States legislating concerning local affairs. [Citations.] This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public, purpose is an extremely narrow one." *Berman,* 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102.

The Court then rejected the appellants' contention that their property was being taken for a private use because the property would be transferred to a private individual or company, stating:

"'Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. [Citations.] Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. [Citation.] The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude." *Berman,* 348 U. S. at 33-34, 99 L. Ed. at 38, 75 S. Ct. at 103.

In *Hawaii Housing Authority,* 467 U.S. at 240, 81 L. Ed, 2d at 197, 104 S. Ct. at 2329, the Supreme Court explained that the public use principle is "coterminous with the scope of a sovereign's police powers." The Court also explained the role of the judiciary in reviewing a legislature's public use determination:

"There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one. [Citation.] The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States,* 269 U.S. 55, 66 (1925), which held that deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' The *Berman* Court also cited to *United States ex rel. TVA v. Welch,* 327 U.S . 546, 552 (1946), which emphasized that '[a]ny departure from this judicial restraint would result in

courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' [Citation.]

* * * [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Authority,* 467 U.S, at 240-41, 81 L. Ed. 2d at 197-98, 104 S. Ct. at 2329-30.

See also *National R. R. Passenger Corp. v. Boston &Maine Corp.,* 503 U.S. 407, 422, 118 L. Ed. 2d 52, 69, 112 S. Ct. 1394, 1404 (1992).

Additionally, the Court reaffirmed the principle outlined in *Berman* that a taking for a public use is not transformed into a private taking through a subsequent transfer to a private party. The Court stated:

"The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [Citation] '[W]hat in its immediate aspect [is] only a private transaction may... be raised by its class or character to a public affair.' [Citation.] *** [G]overnment does not itself have to use property to legitimate the

taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Hawaii Housing Authority,* 467 US. at 243-44, 81 L. Ed, 2d at 199, 104 S. Ct. at 2331.

This court has also been guided by the principles outlined in *Berman.* Thus, in *People ex rel. Adamowski v. Chicago R.R. Terminal Authority,* 14 Ill. 2d 230 (1958), this court held constitutional the Railroad Terminal Authority Act (Ill. Rev. Stat. 1957, ch. 114, pars. 361 through 389). This court noted that the plaintiff's basic objection was that the principal beneficiaries of the act were private corporations. This court stated:

"To the extent that plaintiffs contentions are directed to an alleged absence of public use and public purpose, they are without merit. The General Assembly has described in considerable detail the conditions which the act is designed to eliminate and has declared the public use and public interest that it found to exist. Such a legislative declaration is not to be lightly set aside. [Citations.] 'Public purpose' is not a static concept. It is flexible, and is capable of expansion to meet conditions of a complex society that were not within the contemplation of the framers of our constitution. [Citations.]

"The primary objects of the statute are the removal of the blighted conditions caused by antiquated terminal areas, the promotion of the growth and development of the city, and the relief of traffic congestion ***. [Citations.] It may be that private railroad corporations will derive some benefit under the act. Those benefits, however, will be incidental to the principal purpose of the statute***." *Adamowski,* 14 Ill. 2d at 235-36.

In *Illinois Toll Highway Comm'n v. Eden Cemetery Ass'n,* 16 Ill. 2d 539, 541 (1959), the Illinois State Toll Highway Commission sought to acquire an under-

ground easement for sewer and water facilities through the defendants' cemetery property. The defendants objected that the property was being taken to service a gasoline station to be operated by a private corporation, and to service a privately owned restaurant. This court noted that the purpose of the toll highways was to provide fast, through traffic in a safe manner, and that it was necessary that gasoline service stations and restaurants be located on or in close proximity to the highway proper, thereby reducing a great number of entrances and exits to reach these services. This court reasoned:

"As plaintiff points out, the operations of a gas station or a restaurant are specialized businesses, and are enterprises calling for experts in these fields. So the legislature wisely granted to the Commission the power to make contracts with, and to grant concessions to, and to lease to persons and private corporations. As the court said in the case of *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, at pages 33-34: 'The public end may be as well or better served through an agency of private enterprise than through a department of government-or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.'

"We therefore conclude that service stations and restaurants are an integral part of the toll road system, whether they be operated by the Toll Highway Commission or leased to a private corporation who may be better able to carry on the business, thus bringing about the desired result. We think, further, that since access to sewer and water facilities is essential to the operation of service stations and restaurants, the reasoning which sustains the propriety of arrangements for the latter must uphold as well a reasonable exercise of condemnation powers in obtaining the former. The

present exercise of the power has not been shown to be unreasonable under the circumstances***." *Eden Cemetery Ass'n,* 16 Ill. 2d at 545-46.

See also *People ex rel. City of Urbana v. Paley,* 68 Ill. 2d 62, 76 (1977) ("It is apparent that the city of Urbana intends to undertake the redevelopment in question primarily for the purpose of revitalizing an economically stagnant downtown area. The purpose of the project is therefore clearly and predominantly a public purpose, and the benefit reaped by private developers is merely an inevitable incident thereto"); *People ex rel. City of Salem v. McMackin,* 53 Ill. 2d 347, 355 (1972) ("While we acknowledge that there is a benefit to private interests in the financing of industrial projects under the Act, we hold that the principal purpose and objective of the Act is public in nature. Therefore, it does not matter that there will be an incidental benefit to private interests"); *City of Chicago v. Barnes,* 30 Ill. 2d 255, 257 (1964) ("it does not follow that because the land may later be sold to a private developer its taking and clearance cannot have been for a public purpose").

Turning to the statute in the present case, we note that the legislature determined that "'labor surplus areas currently exist in the southwestern part of the State" (70 ILCS 520/2(a) (West 1998)), and recognized that "the economic burdens resulting from involuntary unemployment fall in part upon the State in the form of increased need for public assistance and reduced tax revenues and, in the event that the unemployed worker and his family migrate elsewhere to find work, may also fall upon the municipalities and other taxing districts within the areas of unemployment in the form of reduced tax revenues, thereby endangering their financial ability to support necessary governmental services for their remaining inhabitants." 70 ILCS 520/2(b) (West 1998). The legislature also found "[t]hat a lack of

decent housing contributes to urban blight, crime, anti-social behavior, disease, a higher need for public assistance, reduced tax revenues and the migration of workers and their families away from areas which fail to offer adequate, decent, affordable housing." 70 ILCS 520/2(d) (West 1998). Thus, the legislature described in detail the conditions the Act was designed to eliminate.

Further, the legislature declared that "'decent, affordable housing" (70 ILCS 520/2(e) (West 1998)) and access to "educational institutions, recreation, parks and open spaces, entertainment and sports, a reliable transportation network, cultural facilities and theaters" (70 ILCS 520/2(f) (West 1998)) should be available to every citizen. The legislature also declared that "the State has a responsibility to help create a favorable climate for new and improved job opportunities for its citizens by encouraging the development of commercial and service businesses and industrial and manufacturing plants within the southwestern part of the State." 70 ILCS 520/2(c) (West 1998). The legislature affirmed that "the main purpose of this Act is to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State." 70 ILCS 520/2(g) (West 1998).

The legislature created the Authority to promote development in Madison and St. Clair Counties. It charged the Authority with the duty to assist in the development, construction and acquisition of industrial projects, housing or residential projects, and commercial projects including cultural facilities such as sports training facilities, racetracks, and parking facilities. 70 ILCS 520/3, 6 (West 1998). In turn, the Authority issued $2 1.5 million of bonds to facilitate the

development of the racetrack. The Authority now seeks to condemn the Property to further the development of the racetrack by increasing available parking. The development of parking facilities is both a project contemplated under the Act and part of the continued development of the racetrack.

We have heretofore upheld the validity of, and found a proper public purpose in, legislative enactments designed to assist economic development (*People ex rel. City of Canton v. Crouch,* 79 Ill. 2d 3 56, 364 (1980), *Paley,* 68 Ill. 2d at 76; *McMackin,* 53 Ill. 2d at 358), to prevent or eliminate blight involving both structural infirmity and economic deterioration (*Paley,* 68 Ill. 2d at 74; *Barnes,* 30 Ill. 2d at 256; *People ex rel. Gutknecht v. City of Chicago,* 3 Ill. 2d 539, 545 (1954); *Chicago Land Clearance Comm'n v. White,* 411 Ill. 310, 316 (1952); *Cremer v. Peoria Housing Authority,* 399 Ill. 579, 588 (1948); *Zurn v. City of Chicago,* 389 Ill. 114, 128 (1945), and to promote public safety (*Eden Cemetery Ass'n,* 16 Ill. 2d at 544). See also *Adamowski,* 14 Ill. 2d at 236 (blighted conditions, promotion of the growth and development of the city and the relief of traffic congestion). Such legislative determinations are well within the state's police powers.

In the, present case, we cannot dispute the legislative findings regarding the need to alleviate certain economic conditions in the southwestern part of this state. Nor can we dispute that alleviation of these conditions constitutes a public purpose. The legislature has determined that the use of eminent domain will further this public purpose. To that end, the legislature has vested in the Authority the power of eminent domain so that the Authority may assist in the development of housing, industrial and commercial projects in the area. The legislature has also given the Authority the power to issue bonds to generate the financial wherewithal for

the development of the projects. The means employed by the legislature to further the public purpose are not irrational.

B. Particular Taking

In the present case, it is undisputed that the Property is subject to the right of eminent domain. NCE's objection to the taking is that the Authority did not properly exercise the right of eminent domain. NCE maintains that the Authority did not act within the limits of the law. We disagree.

Section 7-104(b) of the Code of Civil Procedure provides in part:

"At the [quick-take] hearing, if the court has not previously, in the same proceeding, determined that the plaintiff has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of such right, and that such right is not being improperly exercised in the particular proceeding, then the court shall first hear and determine such matters." 735 ILCS 5/7-104(b) (West 1998).

A finding on each of these three issues amounts to a determination of whether or not the plaintiff has the right to take the property by eminent domain. See *Department of Public Works & Buildings v. Dust,* 19 Ill. 2d 217, 219 (1960). As this court noted in *Department of Transportation v. First Galesburg National Bank & Trust Co.,* 141 Ill. 2d 462, 468 (1990), the plaintiff has only such powers of eminent domain as are conferred upon it by the legislature. See also *Department of Public Works & Buildings v. Keller,* 61 Ill. 2d 320 (1975). The law conferring the right of eminent domain must be strictly construed. *First Galesburg National Bank,* 141 Ill. 2d at 469.

When a defendant files a motion to dismiss challenging the authority to condemn, the burden is on the condemning authority to make a *prima facie* case of the disputed allegations. *First Galesburg National Bank,* 141 Ill. 2d at 469; *Keller,* 61 Ill. 2d at 324. This burden may be met by introducing in evidence a statute affirming the authority's right to acquire property by eminent domain (see *First Galesburg National Bank,* 141 Ill. 2d at 469), or a resolution and ordinance approving the taking (see *City of Chicago v. Walker,* 50 Ill. 2d 69, 71 (1971)). Once the condemning authority has made a *prima facie* case, the defendant is required to go forward with evidence showing that there was an abuse of discretion by the condemning authority. *First Galesburg National Bank,* 141 Ill. 2d at 470; *Keller,* 61 Ill. 2d at 325. The courts will interfere only where an abuse of discretion is shown, for as we have held many times:

"[W]hether the exercise of the power of eminent domain is necessary or expedient to accomplish an authorized purpose is not a question within the province of the court to determine. The agency on which the power has been conferred also has the authority to decide the necessity for its exercise. In the absence of a clear abuse of this authority the courts will not inquire into the necessity or the propriety of its exercise." *Keller,* 61 Ill. 2d at 325,citing *Department of Public Works & Buildings v. McNeal,* 33 Ill. 2d 248 (1965); *Forest Preserve District v. Wike,* 3 Ill. 2d 49 (1954); *City of Chicago v. Vaccarro,* 408 Ill. 587 (1951); *Zurn v. City of Chicago,* 389 Ill. 114 (1945).

In the present case, we find that the Authority satisfied its *prima facie* burden of proof. As noted above, pursuant to section 8(b) of the Act, the Authority may acquire real property, or rights therein, upon condemnation. 70 ILCS 520/8(b) (West 1998). Section 5 of the Act commands the Authority to assist in the develop-

ment of commercial projects, including racetracks and parking facilities. 70 ILCS 520/5 (West 1998). The Authority introduced into evidence a resolution adopted by the St. Clair County board authorizing the acquisition of the Property by use of quick-take eminent domain.[2] The Authority also introduced into evidence a resolution it adopted to acquire the Property by quick-take eminent domain. The resolutions state that it is necessary to create additional parking areas for the racetrack to safely and adequately service racetrack spectators, and that the acquisition of the Property for parking purposes will enhance the public health, safety, morals, happiness, and the general welfare of the citizens of southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues and the expansion of the tax base within St. Clair County. This evidence suffices for a *prima facie* case.

It became incumbent upon NCE to introduce evidence showing that the Authority had abused its discretion. NCE failed in this undertaking. The evidence at the hearing fully supports the circuit court's determination that taking the Property will further economic development, promote safety, and lead to the elimination of blight in the area.

The legislature has determined that it is in the public interest to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of the citizens of this state. To that end, the legislature has vested in the Authority the power of eminent domain to assist in the development of commercial projects including race-

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[2] For purposes of this appeal, NCE does not contest that the Property is in unincorporated St. Clair County.

tracks and parking facilities. The acquisition of the Property being in furtherance of the public purpose, the Authority did not abuse its discretion by the use of its eminent domain powers. Judicial intervention is not warranted.

C. Other Concerns

Our discussion above addresses most of the concerns raised in the briefs submitted by *amici curiae*. *Amici* Illinois Institute for Justice and the Heartland Institute maintain that the process used by the Authority in condemning the Property violates due process by creating impermissible financial bias in favor of condemnation. We note that NCE, whose position these *amici* support, has not raised this issue.

In *People v. P.H.*, 145 Ill. 2d 209 (1991), this court explained the role of *amicus* curiae in an appeal:

"An *amicus curiae* is not a party to the action but is, instead, a "friend" of the court. As such the sole function of an *amicus* is to advise or to make suggestions to the court. [Citation.]

An *amicus* takes the case as he finds it, with the issues framed by the parties. [Citations.] He is not a party to the action [citation], and arguments made by him, but not espoused by the parties, have no binding effect on the parties [citation]. Therefore, we need not pass on grounds of invalidity urged solely by an *amicus*." *P.H.*, 145 Ill. 2d at 234.

Based upon these principles, we decline to consider the issue of due process.

CONCLUSION

We agree with the circuit court that the Authority properly exercised its power of eminent domain. The

taking of the Property is for a public use, not a private use. The appellate court believed otherwise, and, in light of its holding, decided not to address other issues it had determined were properly raised in this interlocutory appeal. We reverse the judgment of the appellate court and remand the cause to that court for further proceedings consistent with this opinion.

Appellate court judgment reversed; cause remanded.

CHIEF JUSTICE HARRISON, dissenting:

The 148.5 acre tract of land at issue in this case was not blighted. It was a productive adjunct to NCE's metal recycling operations. The only reason that it is now owned by Gateway rather than NCE is that it provided the cheapest solution to the parking and traffic problems created by Gateway's expansion of its race track. Other solutions were available. This was just the least expensive. In the end, all SWIDA's intervention did was save Gateway money at NCE's expense.

SWIDA's action in taking NCE's property and transferring it to Gateway for Gateway's private use presents fundamental constitutional issues. Those issues are integral to this dispute and lie at the heart of the appellate court judgment now before us for review. They should have been addressed by the majority.

Under the Illinois Constitution of 1970, the state has no right to take productive, nonblighted real estate from one private landowner in order to provide pecuniary benefits to another. The appellate court was therefore correct in reversing the order of the circuit court approving the eminent domain quick-take action brought by SWIDA. To hold otherwise, as the majority does today, represents a fundamental and destructive

shift in basic principles of property ownership. The appellate justice who specially concurred made the case forcefully. I cannot improve on his words:

"If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.

The attraction of private venture capital is a worthy public goal, and the legislature provided SWIDA with numerous ways to accomplish it. While this legislation offers unquestionable potential for the kind of social and economic advancement that follows capital investment, it exceeds sacred parameters when it empowers SWIDA to lure private investors with the promise of any prime land those investors want to take.

This part of SWIDA's statutory power offers dubious progress. It is, after all, akin to the tyranny our forefathers fled. Our heritage stems in part from the aversion to the King's use of property to convey favor upon a privileged nobility. It betrays that heritage to rekindle the practice." 304 Ill. App. 3d at 556 (Kuehn, J., specially concurring).

For the foregoing reasons, I dissent.

JUSTICES THOMAS and KILBRIDE join in this dissent.

JUSTICE KILBRIDE, also dissenting:

I fully agree with Chief Justice Harrison and I join in his dissent. I feel compelled, however, to offer some additional observations because the power of eminent domain is one of the most absolute, forceful, and intrusive evil powers of government. The taking in this case carries "the right of eminent domain to an alarming and dangerous extent." *Gaylord v. Sanitary District,* 204 Ill. 576, 585 (1903). Today, we are overlooking established precedent and allowing an unconstitutional taking of private property. Accordingly, in addition to the reasons set forth by Chief Justice Harrison, I briefly dissent for the following reasons.

The right of the sovereign to condemn private property is limited to takings for a public use. U.S. Const., amend. V; Ill. Const. 1970, art. 1, §15; *Gaylord,* 204 Ill. at 588. The majority correctly notes that private persons may ultimately acquire ownership of property arising out of a taking and the subsequent transfer to private ownership does not by itself defeat the public purpose. *Hawaii Housing Authority v. Midkiff,* 467 U. S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). Nevertheless, this case is not about the ultimate transfer of property to a private party. Rather, the precise and controlling issue is whether the development authority could transfer the property to a private party for a profit when the property is not put to a public use?

The resolution of that issue depends on whether the taking and the transfer of property achieves a legitimate legislative purpose and a public use pursuant to the constitutionally exercised police power of the government. *Berman v. Parker,* 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954). *Berman* cautions that defining the police power's reach turns on the facts of each case. *Berman,* 348 U.S. at 31-32, 99 L. Ed. at 37, 75 S. Ct. at 102. In this case, the facts do not justify the exercise of the police power of eminent domain.

To review some of the key facts in this case, the power of eminent domain was exercised solely to acquire additional parking for the racetrack. In the initial phase of development and without any eminent domain proceedings, Gateway racetrack employed the bonding authority of Southwestern Illinois Development Authority (SWIDA) to acquire land for the racetrack and to develop the land into a financially viable racing facility. Upon building and operating a successful racing facility, Gateway later decided that it needed additional parking because of increasing attendance. The need for, additional parking was a direct result of Gateway's successful operations.

In 1997, Gateway initially had a total seating capacity of 50,000. Throughout 1997, Gateway successfully hosted a number of events with total attendance of 400,000. In 1998, Gateway increased its seating capacity and it hosted at least four major race events. Gateway wanted additional seating for a total capacity of 85,000 to 100,000 for each event. In short, Gateway's success and increased seating capacity drove Gateway's need for additional parking.

To obtain additional parking, Gateway sought to purchase NCE's land, but Gateway could not negotiate a favorable purchase price. Gateway then requested that SWIDA exercise its eminent domain authority for the acquisition of NCE's land. SWIDA agreed.

Was SWIDA then furthering its legislative mandate to encourage economic development or was it merely assisting the purely private rapaciousness of Gateway?

A major flaw in justifying the exercise of eminent domain in this case is that the taking is not clothed in an independent, legitimate governmental decision to further a planned public purpose. SWIDA did not conduct a parking study. SWIDA never formulated any

economic plan requiring additional parking. In fact, all of SWIDA's public policy pronouncements at the time of the quick-take hearing were after-the-fact rationalizations.

SWIDA's true intentions were demonstrated when SWIDA publicly advertised in a "Quick-Take Application Packet" that, for a fee, SWIDA would condemn land at the request of "private developers" for the "private use" of developers. SWIDA also entered into a contract with Gateway to condemn whatever land " may be desired * * * by Gateway." Obviously, the impetus for the taking was not born of SWIDA's legislative and economic development planning process. Rather, it was solely in response to Gateway's expansion plans. More precisely, it was spawned by Gateway's failed attempts to purchase NCE's land at a price acceptable to Gateway.

One of the most alarming facts in the record is that Gateway certainly could have built a parking facility on its existing property. Gateway realized, however, that the cost of building a parking garage on its own land was substantially higher than using the power of SWIDA to take NCE's land for open field parking. The additional parking on NCE's land now makes it possible for Gateway to realize an extra $13 million to $14 million in projected revenue per year. Thus, I submit that the taking in this case smacks of nothing more than the misuse of governmental power for the purely private purposes of expanding a thriving racing facility, saving money for Gateway on the purchase of the property, and increasing Gateway's profits.

The precedential danger inherent to the Gateway eminent domain scenario is that it takes us down the perilous, proverbial "slippery slope" and it blurs the line of the public purpose test. We might compare the

initial development for the race facility to the taking of land for gas stations along a toll road. A highway toll authority may justify the use of eminent domain to ensure that motorists have reasonable access to gasoline stations. *Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n,* 16 Ill. 2d 539,546 (1959). The next step is, however, the dangerous step similar to the facts in this case. Could the highway authority then exercise eminent domain to augment a financially viable gas station to condemn additional land for a car wash, and then a lube shop, and then additional expansions for a motel, small retail shops, and entertainment centers? The initial, legitimate development of a public project does not justify condemnation for any and all related business expansions.

Undoubtedly, the declaration of a public purpose is much easier when the only players are governmental units. When the taking involves private parties as the ultimate recipients of the land, it becomes increasingly difficult to balance the legitimate public purpose against the bestowal of private benefit. There may not be a bright-line test for determining when the taking is so weighted in favor of private benefit that it has no legitimate public purpose. Nonetheless, I believe that this case improperly tips the balance in favor of a purely private benefit without a sufficient showing of a legitimate public purpose. In short, the condemnation was an end run around the open real estate market. The acquisition of the land by Gateway served the goal of economic development only by increasing its profits on its already successful operations.

On related matters, the majority bases its decision upon our past precedent of assisting economic development, preventing or eliminating blight, and promoting public safety. Slip op. at 19-20. The majority reasons that SWIDA is merely fulfilling one or more of those

proper legislative purposes in acquiring the land for parking.

That rationale and the majority's cited authority are problematic for several reasons. First, the additional parking is not directly preventing or eliminating blight on the site of the expanded parking area. The site of the new parking is open ground and contains no dilapidated structures. Admittedly, the expanded development eases the parking crunch for the additional crowds, thereby increasing sales, possibly boosting an economic spinoff, and in effect theoretically reducing blight. Despite any possible abstract attainment of blight reduction, the taking in this case does not directly impact that goal. A business improvement's indirect benefit to the public is insufficient to justify condemnation. See *Gaylord,* 204 Ill. at 586, quoting *Byerson v. Brown*, 35 Mich. 333, 336-42 (1877). Therefore, with respect to blight, the Gateway parking project does not satisfy the public benefit test.

Additionally, the purported goal of public safety is in fact a false rationale to justify Gateway's private parking needs. Gateway's need for increased parking is directly related to its success and its expansionist decision to increase grandstand seating. To the extent that Gateway's operations create any public safety, parking concern, the appropriate local governmental response should have been to enforce the typical zoning regulation that a business may only operate when it can provide adequate parking for customers. See *Thomas v. Zoning Board of Appeals,* 72 Ill App. 3d 934 (1979) (enforcing zoning requirement that business provide off-street parking for customers). When the facts in this case are viewed in the context of how local governments commonly handle parking issues, the condemnation of private property for parking defies common sense and all notions of fundamental fairness.

Next, the promotion of economic development has already been satisfied through the initial successful development of the racetrack. Simply put, NCE's land is not fundamental or "pivotal" to Gateway's economic success or to the general economy within SWIDA's jurisdiction. NCE's land is pivotal only to assure Gateway's higher profits.

The continued economic development of Gateway's private business directly benefits a private concern. Moreover, it is illogical to use Gateway's underlying success as the predicate for correcting "economic deterioration" in furtherance of a legislative goal to improve economic development. Furthermore, even though a viable business enterprise indirectly impacts the general local economy in St. Clair County, a legitimate public purpose is not satisfied when the taking operates principally to augment a private business. See *Sholl v. German Coal Co.,* 118 Ill. 427, 431-34 (1887).

Moreover, the authority cited in the majority opinion does not squarely support the result in this case. The majority primarily relies upon *McMackin, Paley,* and *Crouch.* None of those three cases involve eminent domain and a development authority statute similar to the SWIDA Act.

McMackin is not an eminent domain case. *McMackin* is an original *mandamus* action to compel a home rule mayor to sign development bonds and a lease under the Industrial Project Revenue Bond Act.

McMackin is cited as authority in *Paley,* another *mandamus* action to compel a mayor to execute bonds for commercial development and the elimination of blight. *McMackin* and *Paley* are also cited in *Crouch,* again another *mandamus* action to compel a mayor to sign bonds in eliminating blight under the tax increment financing statute.

Without a doubt, all three of those cases recognize that economic development is a public purpose. None of those cases are, however, eminent domain cases and they provide no authority for the taking of private property for the specific purpose of economic development. Those cases simply justify the expenditure of public funds for the elimination of blighted areas and the attendant positive effect on economic development, That distinction is not without importance. The compelling difference is that the long-standing sacred right of ownership of private property must not yield to the promotion of economic development by assisting purely private business ventures.

Equally important, the majority's decision overlooks longstanding eminent domain doctrines that a successful business might indirectly benefit the public, but indirect benefits do not justify eminent domain. *Gaylord,* 204 Ill. at 586, quoting *Byerson v. Brown,* 35 Mich. at 336-42. *Gaylord* explained that every lawful business incidentally benefits the public. *Gaylord,* 204 Ill. at 586, Almost 100 years, ago, *Gaylord* pronounced that it is "the settled doctrine of this court that to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." *Gaylord,* 204 Ill. at 584.

Gaylord firmly instructed that "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. "*Gaylord,* 204 Ill. at 584. Here, the racetrack may be open to the public, but not by right, and only by permission through the payment of admission fees. The Gateway racing operation may provide some public enjoyment, but it is a private venture designed to result in private profits. Gateway's parking lot is simply not a public use.

In 1926 this court held that a railroad could not exercise the right of eminent domain to acquire property for the purpose of constructing a spur track and public freight house. Our court found that a spur track and public freight house provided a minimal public benefit and principally benefitted the railroad and a few businesses. *Limits Industrial R.R. Co. v. American Spiral Pipe Works,* 321 Ill. 101, 109-10 (1926). Despite a certificate of convenience and necessity issued by the Illinois Commerce Commission, our court found that it was manifest that the railroad was not organized to serve the general public or any other public purpose. Based on that finding, *Limits Industrial* reversed the railroad's condemnation judgment.

Limits Industrial is strikingly similar to this case. Just as *Limits Industrial* challenged the Illinois Commerce Commission's findings of a public demand and necessity for a railroad public freight-receiving station and spur track, this court should question SWIDA's findings and declare that the additional parking principally serves the goal of saving money for Gateway instead of fostering SWIDA's statutory mandate. Our court recognized in *Limits Industrial* that when the true beneficiaries of the take are private businesses and not the public, the power of eminent domain will not be exercised to serve those purely private interests.

Limits Industrial rejected the Illinois Commerce Commission's findings of public convenience and necessity as "a subterfuge to give color of right to the attempt to condemn" the land for the private benefit of a select few. *Limits Industrial,* 321 Ill. at 110. Now some 75 years later, the same subterfuge is playing out before us. The railroad freight station is now a parking lot and SWIDA's actions are simply a ruse to cloak a private enterprise in the garb of a public project.

Therefore, I respectfully dissent.

CHIEF JUSTICE HARRISON and JUSTICE THOMAS join in this dissent.

APPENDIX C

SOUTHWESTERN ILLINOIS
DEVELOPMENT AUTHORITY,
Plaintiff-Appellee,
v.

NATIONAL CITY ENVIRONMENTAL.
L.L.C., and St. Louis Auto Shredding Company,
Defendant-Appellants, and Unknown
Owners, Defendants.

No. 5-98-0263.

Appellate Court of Illinois.
Fifth District.

April 29, 1999.

Justice CHAPMAN delivered the opinion of the court:

National City Environmental, L.L.C. (NCE), and St. Louis Auto Shredding Company (St. Louis Auto) appeal from the circuit court's decision that approved an eminent-domain quick-take action brought by Southwestern Illinois Development Authority (SWIDA). NCE and St. Louis Auto raise five arguments on appeal: (1) SWIDA lacks the constitutional authority to take NCE's land and convey it to a private party for private profit, (2) the circuit court erred in allowing SWIDA to use its quick-take powers without obtaining the approval of East St. Louis, (3) the court erred in failing to dismiss SWIDA's condemnation complaint because SWIDA failed to give 60 days' notice to NCE, (4) the court erred in ruling that quick-take was appropriate without a showing of immediate need, and (5) SWIDA failed to make a good-faith attempt to negotiate. SWIDA questions this court's jurisdiction over these issues. We reverse.

[1][2] The jurisdictional issue must be addressed first. This case arises from an interlocutory appeal pursuant to Supreme Court Rule 307(a)(7) (166 Ill.2d R. 307(a)(7)) and section 7-104(b) of the Eminent Domain Act (735 ILCS 5/7-104(b) (West 1996)). *Southwestern Development Authority v. Vollman,* 235 Ill.App.3d 32, 175 Ill.Dec. 683, 600 N.E.2d 926 (1992), held that, in an interlocutory appeal pursuant to Supreme Court Rule 307(a)(7) and section 7-104(b) of the Eminent Domain Act, only three issues could be raised: (1) whether the plaintiff has the authority to exercise the right of eminent domain, (2) whether the property taken is subject to the exercise of such right, (3) whether the right is being properly exercised in the proceeding. Thus, defendants' interlocutory appeal in this case is limited to the three issues described in section 7-104(b). In this case, that would include defendants' issues (1), (2), and (3). Issues (4) and (5) are appealable at the conclusion of the eminent domain proceeding. See *Vollman,* 235 Ill.App.3d 32, 175 Ill.Dec. 683, 600 N.E.2d 926.

NCE operates a metal-recycling center located in what, until recently, was National City, Illinois. NCE has been at its present location since 1975 and employs 80 to 100 people full time. NCE's factory shreds cars and appliances and separates the reusable metals. It disposes of nearly 100,000 cars per year. The nonrecyclable by-products are referred to as "fluff." Fluff is deposited into NCE's landfill, which is located to the east of its recycling center. When this landfill reaches capacity, NCE plans to expand its landfill operations onto a 148.5-acre tract of land NCE owns to the east of the current landfill. NCE currently uses the clay and dirt from the 148.5-acre tract to cover the fluff in the existing landfill.

In 1987, the Illinois General Assembly passed the

Southwestern Illinois Development Authority Act (Ill.Rev.Stat.1987, ch. 85, par. 6151 *et seq.;* now see 70 ILCS 520/1 *et seq.* (West 1996)), which created SWIDA. SWIDA has the authority to take land by eminent domain, via its quick-take powers (see 735 ILCS 5/7-103 (West 1996)). The legislature set forth the following policy reasons for SWIDA's existence:

"(c) That the State has a responsibility to help create a favorable climate for new and improved job opportunities for its citizens by encouraging the development of commercial and service businesses and industrial and manufacturing plants within the southwestern part of the State;

(f) That in order to foster civic and neighborhood pride, citizens require access to * * * entertainment and sports * * *; [and]

(g) That the main purpose of this Act is to promote industrial, commercial, residential, service, transportation[,] and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health. safety, morals, happiness[,] and general welfare of this State." 70 ILCS 520/2 (West 1996).

SWIDA advertises that, in exchange for fees and expenses, it will condemn land at the request of private developers to assist in advancing these policies.

Gateway International Raceway, a motorsports raceway, is located adjacent to NCE. In 1994, Grand Prix Association of Long Beach, Inc. (GPALB), a California corporation, decided to purchase Gateway International Raceway and to replace its existing facility with a new raceway. In June 1996, SWIDA issued $21.5 million in taxable sport-facility revenue bonds and loaned the proceeds to GPALB. GPALB used these

funds to acquire Gateway International Raceway and to transform it into a facility capable of hosting major stock-car races.

In early 1998, GPALB (hereinafter referred to as Gateway) sought to expand its parking capacity, and it attempted to discuss the purchase of NCE's land with NCE's owner, but NCE would not discuss the matter. Gateway made no offers to NCE for its property. Instead, Gateway asked SWIDA to exercise its quick-take powers to take NCE's 148.5-acre tract and convey it to Gateway. In its February 20, 1998, application to SWIDA, Gateway stated that it wanted to use NCE's land as a parking lot for the purpose of further increasing the value of Gateway's racetrack. In March 1998, Gateway president Rod Wolter met with former United States Senator Alan Dixon, SWIDA's executive director Alan Ortbals, and a representative from NCE to discuss the purchase of NCE's property. At that tune, Gateway offered $1 million to NCE's representative, and NCE declined it. On March 20, 1998, SWIDA made the same offer to NCE and advised NCE that SWIDA would initiate condemnation proceedings to take NCE's land if NCE did not accept the offer.

NCE refused the offer and SWIDA filed a quick-take proceeding. On April 27, 1998, the trial court ruled in SWIDA's favor, fixed the value of the land at $900,000, and on April 30, 1998, conveyed it to SWIDA. On April 30, 1998, SWIDA conveyed the land to Gateway.

[3] The controlling question in this case is whether SWIDA had constitutional authority to take NCE's land and convey it to Gateway for private profit. SWIDA argues that the issue is not the proper subject of an interlocutory appeal under Rule 307(a)(7). We disagree. Defendants are not questioning the constitutionality of SWIDA's eminent-domain authority. Rather,

defendants challenge the constitutionality of SWIDA's conduct in this case.

[4] NCE concedes that SWIDA has the authority to exercise the right of eminent domain and that NCE's property is subject to the exercise of such right. However, NCE insists that the acquisition of land by eminent domain proceedings must be for a public purpose and that land may not be condemned for private use. See *City of Chicago v. Barnes,* 30 Ill.2d 255, 257, 195 N.E.2d 629, 631 (1964). Moreover, in Illinois it is well settled that the courts have a right to render the final decision on whether land sought to be condemned is to be used for a public purpose or a private purpose. *Zurn v. City of Chicago,* 389 Ill. 114, 59 N.E.2d 18 (1945).

[5][6][7][8] Eminent domain refers to the power of the state to take private property. *E. Meidinger, The "Public Uses" of Eminent Domain: History & Policy,* 11 Envtl.L. 1, 2 (1980). Every private owner of property holds her title subject to the lawful exercise of the sovereign power of eminent domain. *Deerfield Park District v. Progress Development Corp.,* 22 Ill.2d 132, 137, 174 N.E.2d 850, 853 (1961); *City of Chicago v. Boulevard Bank National Ass'n,* 293 Ill.App.3d 767, 228 Ill.Dec. 146, 688 N.E.2d 844 (1997). Article I, section 15, of the 1970 Illinois Constitution and the fifth amendment to the United States Constitution prohibit the taking of private property for public use without just compensation. The federal guarantee that private property shall not be taken for public use without just compensation is applicable to the states through the fourteenth amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago,* 166 U.S. 226, 233-34, 17 S.Ct. 581, 583-84, 41 L.Ed. 979, 983-84 (1897).

In America, the first constitutions to use the words "Public use" were those of Virginia and Pennsylvania in

1776. *L. Berger, The Public Use Requirement in Eminent Domain,* 57 Or.L.Rev. 203, 204 (1978). In the four decades following the adoption of the United States Constitution, there were two major kinds of activities for which the power to condemn was used: building roads and milldams. See *P. Nichols, The Meaning of Public Use in the Law of Eminent Domain,* 20 B.U.L.Rev. 617 (1940). Roads are clearly used by the public. States authorized the erection of dams for gristmills, although the dams flooded land, because, as the mills were required by law to the grain of all comers, they were regarded as public utilities. 20 B.U.L.Rev. at 619.

The uses of eminent domain expanded as the economy expanded. In the 1840s 1850s, eminent domain was used to condemn property for the construction of railroads. The surge in industrial growth created a major drive to exploit western resources and open western markets. 11 Envtl.L. at 29. In the 20th century, the public-use clause has enabled governing bodies to further economic development, including the use of eminent domain to alleviate economic malaise. See *People ex rel. City of Urbana v. Paley,* 68 Ill.2d 62, 11 Ill.Dec. 307, 368 N.E.2d 915 (1977); *City of Chicago v. Barnes,* 30 Ill.2d 255, 195 N.E.2d 629 (1964).

Early on, the supreme court recognized that no specific formula exists for determining what is or is not a public use. In 1946, the supreme court stated in *People ex rel. Tuohy v. City of Chicago,* 394 Ill. 477, 481-82, 68 N.E.2d 761, 764 (1946), as follows:

"While from time to time, the courts have attempted to define public use, there is much disagreement as to its meaning. * * *

* * * The purpose may be highly beneficial to the Public as well as to private interests; and, on the other hand, the use put to land acquired by private interests

by eminent domain may be highly beneficial to the public, without giving the latter any control over the property taken

The problem is rendered more complex by development arising since the adoption of the constitution, such as needs for acquiring property for social, medical[,] or health purposes, as well as for the application of new inventions which may be adapted to public use. Uses for purposes not contemplated at the time may be, and frequently are, declared by the legislature to be public uses for which the power of eminent domain may be properly used."

In *Tuohy,* 394 Ill. 477, 68 N.E.2d 761, the supreme court upheld a city ordinance that approved the condemnation and sale of land for the redevelopment of blighted or slum areas. Although the court recognized that the city cannot go into the real estate business under the guise of relieving slum conditions, the court held that acquiring land for the purpose of demolition and private sale is a public use and not a private one. The court held that the use of the power of eminent domain was amply justified under the circumstances. *Tuohy,* 394 Ill. at 487, 68 N.E.2d at 766-67. In reaching its decision, *Tuohy* discussed the criteria to be used in determining a public use. These criteria were: (1) the use should affect a community as distinguished from an individual, (2) the law should control the use to be made of the property, (3) the title so taken should not be invested in a person or corporation as private property to be used and controlled as private property, and (4) the public should reap the benefit of public possession and use and no one should exercise control except the municipality. *Tuohy,* 394 M. at 485, 68 N.E.2d at 766; see *Poole v. City of Kankakee,* 406 Ill. 521, 94 N.E.2d 416, 419 (1950) (discussing *Tuohy*).

The supreme court, applying similar criteria, has upheld the exercise of eminent domain power for many purposes: for off-street parking (*Poole v. City of Kankakee,* 406 M. 521, 94 N.E.2d 416 (1950)); for park purposes (*Deerfield Park District v. Progress Development Corp.,* 26 Ill.2d 296, 186 N.E.2d 360 (1962)); to clear a slum and blighted area for redevelopment by private enterprise (*City of Urbana v. Paley,* 68 Ill.2d 62, 11 Ill.Dec. 307, 368 N.E.2d, 915 (1977); *City of Chicago v. Barnes,* 30 Ill.2d 255, 195 N.E.2d 629 (1964)); for the creation of a local service drive to provide access to freeways (*Department of Public Works & Buildings v. Farina,* 29 Ill.2d 474, 194 N.E.2d 209 (1963)); and for an auto service station and restaurant to be located adjacent to a toll highway (*Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n,* 16 Ill.2d 539, 158 N.E.2d 766 (1959)). In addition, a public use or purpose has been recognized in actions taking property for: school purposes (*Scheller v. Trustees of Schools of Township 41 North, Range 12 East of the Third Principal Meridian,* 67 Ill.App.3d 857, 24 Ill.Dec. 104, 384 N.E.2d 971 (1978)); the construction and installation of a cable television system (*Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc.,* 157 Ill.App.3d 713, 109 Ill.Dec. 914, 510 N.E.2d 982 (1987)), and the preservation of the natural beauty of areas through which state highways are constructed (*Department of Public Works & Buildings v. Keller,* 22 Ill.App.3d 54, 316 N.E.2d 794 (1974), aff'd, 61 Ill.2d 320, 335 N.E.2d 443 (1975)).

As disparate as these purposes are, it should be noted that none of them involve the taking of property from one private party and the immediate transfer of it to another private party, whose interest in the property is solely to earn greater profits. It is clear that each of the listed takings served a public purpose, which is at the heart of Locke's principle that governments were insti-

tuted to protect every person's property against the depredations of his neighbor. *W. Stoebuck, A General Theory of Eminent Domain,* 47 Wash. L.Rev. 553, 595 (1972).

The American colonists understood Locke's theory of representative government to apply to eminent domain. Locke theorized that private property could only be taken by consent of the individual in person or by his governmental representatives consenting for him. 47 Wash. L.Rev. at 567. According to the principle of representational government, there is no compulsory taking, but rather a voluntary relinquishment by delegated consent. 47 Wash. L.Rev. at 569. Locke's social contract theory postulates as follows:

"When men were in a simple state of nature, before government was formed, they enjoyed private property and personal liberty unhindered. As natural society became more complex, its members impinged upon each other, so that it became necessary to form governments, the purpose of which was to preserve the private rights enjoyed in the state of nature. Government is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly. They recognize that government needs their money and other property to operate, but it would defeat the very purpose if government could extract a larger share from a subject than it needs to serve its purposes to him.***

No claim is here made that Locke is right or wrong in any ultimate sense-- only that his was the accepted theory of government in America when the American doctrine of eminent domain was being hammered out." 47 Wash. L.Rev. at 585-86.

Illinois cases have embodied the idea of a social contract by imposing a public purpose limitation on the

exercise of the eminent domain power. Under the social contract in eminent-domain cases, the private landowner relinquishes her property to the government, and the public is likened to a third-party beneficiary, as it is the public who reaps the benefit of the bargain. Takings of private property are justified only where the third party beneficiary is the public.

[9] In this case, however, SWIDA's board of directors passed a resolution on March 5, 1998, agreeing to use its quick-take powers to acquire NCE's property on Gateway's behalf. Gateway's application was, in part, as follows: "APPLICATION FOR THE USE OF QUICK TAKE EMINENT DOMAIN

1) Applicant Information
Date: February 20, 1998
Applicant: Gateway International Motorsports Corporation/St. Clair County

2) The Development Project

Project Description:
Acquisition of tract of land described herein.

Location (describe the general location of the project and attach map):

Adjacent to 700 Raceway Blvd., Madison, IL
Economic Development Impacts of Project (explain how the project will create or retain jobs, enhance or protect the tax base, etc.): It is the further development of Gateway International track[,] creating and retaining jobs[,] and further increasing the value of the racetrack and its environs.

Status of Project:

Inception.

Funding for the Project (amount, source and status):

> Property is in the process of being appraised[,] and funds will come from Gateway International Motorsports Corporation and its parent corporation, Grand Prix Association of Long Beach, Inc.

Urgency of Need (describe the timing of the project and why timely acquisition is necessary for its successful completion)

> The racing season commences in early spring[,] and more parking is necessary to adequately handle the crowd." (Emphasis added.)

It should be noted that the taking was conducted under SWIDA's quick-take application procedure, which charged an eminent-domain application fee of $2,500 for projects to be taken for private use. In addition, all attorney fees and costs of the condemnation proceedings incurred by SWIDA were paid by Gateway, as was the $900,000 quick-take amount.

Rod Wolter, president and general manager of Gateway International Raceway, testified that the raceway needs NCE's 148.5 acres for additional parking. Wolter testified that with the additional parking, Gateway would grow and profits would increase. Wolter acknowledged that it is less expensive to have the parking area at ground level than it is to have to build a parking garage.

Christopher Pook, chief executive officer of Grand Prix Association of Long Beach, California, testified that if Gateway had additional parking, it could host a Winston Cup race, which could gross $9 million. Pook testified that Gateway could also realize gains of $3 million to $4 million if it had the parking facilities

needed to host two other major racing events. SWIDA contends that Gateway's development project would "enhance the public health, safety, morals, happiness, and the general welfare of the citizens of Southwestern Illinois through the creation of job opportunities, the generation of additional tax revenues[,] and the expansion of the tax base within St. Clair County." SWIDA contends that the public will benefit from this quick-take, and it submits that the testimony of several knowledgeable people supports this proposition.

John Baricevic, St. Clair County board chairman, testified that quick-take is necessary for this project because the county needs to develop the track to its economic potential for property taxes and jobs.

Alan Ortbals, SWIDA's executive director, testified that quick-take powers were needed in this case because of the economic development importance of the project. Gateway initially contacted SWIDA for the purpose of acquiring the property to use as an additional parking area. Ortbals testified that in 1997 SWIDA changed its policy of not using its quick-take power for private entities, to a policy where it would use its quick-take power on behalf of private entities. In 1997 SWIDA used its power to take the land of Carl Lukas and transfer it to Gateway. In exchange for SWIDA's assistance, Gateway paid SWIDA's costs and expenses in connection with the Lukas deal. Ortbals testified that quick-take was justified in the case at bar, as it was in the Lukas matter, because of the safety issues involved and to a lesser extent as a means of eliminating slums and blight.

As for the safety concerns, Ortbals testified that on days races are held, traffic is congested on the highway leading to the racetrack. In addition to this safety concern, Gateway would like to acquire additional

parking so that pedestrians are not crossing a highway to get from the existing parking area to the racetrack. Ortbals testified, however, that to his knowledge no accidents have occurred in connection with the race-day traffic. Ortbals testified that due to the development of restaurants and motels in the area, Gateway customers will have fewer parking spaces. Gateway recently added 10,000 seats to its facility, and Gateway needs the additional 148.5 acres to satisfy the demand for parking.

Alan Ortbals testified that to his knowledge no studies have been commissioned by SWIDA to analyze the extent to which the tax base will be expanded by taking NCE's land. In addition, Ortbals testified that no particular studies have been made to support the theory that Gateway's expansion of its parking area will enhance employment prospects. Ortbals also testified that although there are no slums on the 148.5 acres, the taking of this land would have the indirect effect of eliminating any nearby slums.

Mike Pritchett, a design and planning engineer for the Illinois Department of Transportation in Collinsville, testified that his department is trying to devise a traffic plan to efficiently move traffic on race day with minimal impact on the highways. Pritchett testified that he believes that the acquisition of the 148.5 acres for additional parking will help alleviate the traffic safety problem but that it will not eliminate it. Pritchett also testified that a skyway could be constructed across the highway for pedestrian traffic and that would solve the problem of pedestrians crossing the highway to reach the raceway.

John Hamm., the mayor for the City of Madison, where Gateway is located, testified that Gateway has helped economic development in his city. He testified

that Gateway has encouraged the Illinois Department of Transportation to help the City of Madison with road improvements. Hamm testified that the sales and entertainment taxes, generated during race days has been significant as well.

Mark Westoff, the president of the Southwestern Illinois Tourism and Convention Bureau, testified that tourism is the second largest industry in this eight-county area. Westoff estimated that in 1997 Gateway had an economic impact on the region of 43.4 million dollars which otherwise would not have come into this region. Westoff testified that he hopes to see Gateway grow and continue to contribute to tourism in this region.

Rod Wolter, president and general manager of Gateway International Raceway, testified that Gateway intends to add additional seating to its facility in the fall of 1998. Wolter testified that Gateway continues to expand its list of events, which in turn will attract more people. He testified that 49 acres of land will accommodate 5,000 cars, which would greatly reduce Gateway's parking problem. Wolter testified that although Gateway could build a parking garage upon its existing land, Gateway rejected this idea because of the expense. Wolter agreed that it is less expensive to have SWIDA acquire ground from NCE than it would be for Gateway to build a parking garage. SWIDA argues that the taking of property for the redevelopment of a slum and blighted area is a taking for a public purpose and that the fact that a portion will be resold for development for private purposes does not render the condemnation invalid. SWIDA argues that Gateway's development of NCE's 148.5 acres will bolster tourism and the economy in the region. SWIDA admits that the primary thrust of this acquisition is not the elimination of slums and blight, but it contends that it is a valid incidental

purpose. SWIDA cites the following cases in support of its position: *Village of Wheeling v. Exchange National Bank of Chicago,* 213 Ill.App.3d 325, 157 Ill.Dec. 502, 572 N.E.2d 966 (1991), City of Chicago v. Walker, 50 Ill.2d 69, 277 N.E.2d 129 (1971), and *City of Chicago v. Gorham,* 80 Ill.App.3d 496, 35 Ill.Dec. 905, 400 N.E.2d 42 (1980). These cases hold that the acquisition of slum and blighted areas for clearance and redevelopment is itself a taking for a public purpose, regardless of the subsequent use of the property. However, these cases are of little assistance in this case because we are not dealing with a taking to eliminate slums and blight. The evidence reveals that NCE presently utilizes the 148.5-acre tract in its business and anticipates using it to a greater extent as a landfill. Although this may not be the highest and best use of the property, such use does not render the land blighted.

[10] Implicit in the cases cited by both parties is the principle that though land can be taken for a proper public use, taking private property for private use under the law of eminent domain is in direct contravention of article 1, section 15, of the Illinois Constitution. The legislature's statement that SWIDA's purpose is, in part, to promote the public health, safety, morals, happiness, and general welfare of this State is entitled to respect. However this is not an urban-renewal case, nor is the taking a justifiable "public use." The expansion of Gateway parking is a private use, rather than a public use.

[11] In this case we have no blight and no slum. NCE runs a recycling business for profit, and it utilizes the 148.5 acres as a part of its profit-making business. Coincidentally, the use of the 148.5 acres also confers a public benefit by acting as a landfill for our waste. Gateway operates a privately owned raceway for profit. Gateway International Raceway's president and gen-

eral manager, Rod Wolter, testified that Gateway could build a parking garage to alleviate its parking problem but that it was less expensive to have SWIDA acquire the property and transfer it to Gateway. We have found no Illinois precedent to support the proposition that where a private enterprise admits it can use its own resources to develop its property (in this case by building a parking garage), a condemning authority is justified in using its power of eminent domain to take private property from an unwilling seller and to transfer it to another private enterprise to increase the profits of that enterprise. See *Reel v. City of Freeport,* 61 Ill.App.2d 448, 209 N.E.2d 675 (1965).

The expansion of the raceway would undoubtedly increase revenues for the Gateway corporation. Likewise, Gateway's success would have the incidental effects of increasing revenues for other private enterpriser, in the area and of expanding the tax base of local municipalities. Notwithstanding any incidental economic benefit from SWIDA's actions in this case, we cannot subordinate a constitutional right to private corporate interests.

[12] Eminent domain is an intrusive power, and the potential for its abuse is boundless. It is the function of the courts to give effect to the constitutions. It is the courts' duty to enforce the constitutional limitation against taking private property by eminent domain except for public purposes. Although the term "public use" is flexible in an ever-changing society, the basic concept of private property does not change.

We have reviewed the record, the arguments submitted, and the law, and we determine that in this case, SWIDA exceeded its constitutional authority in taking NCE's land by eminent domain. Given our decision, we need not reach the other issues raised on appeal.

In conjunction with this appeal, on June 26, 1998, defendants NCE and St. Louis Auto filed a motion to hold SWIDA and Gateway in contempt for violating this court's order issuing a stay pending appeal and to award sanctions under Supreme Court Rule 375 (155 Ill.2d R. 375). Defendants' motion alleged that despite this court's stay order, SWIDA and Gateway have begun clearing the land and taking actions that threaten to destroy the usefulness of NCE's property. Defendants alleged that SWIDA and Gateway have unloaded bulldozers, excavated roadways, cleared brush and timber, and dumped rock onto the property. SWIDA and Gateway responded that they are not in contempt of this court's order because Gateway held title to the 148.5 acres before the stay was entered. We deny NCE's and St. Louis Auto's motion to hold SWIDA and Gateway in contempt.

Motion denied;
reversed.

WELCH, J., concurs.

Justice KUEHN, specially concurring:

This case is more troublesome than the majority opinion would seem to suggest. Staunch proponents for economic progress would quarrel with our essential judgment that the expansion of Gateway parking served a purely private, rather than public, purpose. They would argue that the legislature clearly contemplated eminent domain's use in the manner employed and foreordained that racetrack parking lots could serve a public purpose.

Because this seems apparent from the statute that created SWIDA and empowered it to act, we need to examine whether that statute rather than SWIDA's conduct in this case contravenes article 1, section 15, of

the Illinois Constitution.

SWIDA was created with one overriding goal in mind - -to promote and facilitate economic progress in the southwestern part of Illinois. Lawmakers directed as follows:

"It shall be the duty of [SWIDA] to promote development within the geographic confines of Madison and St. Clair counties. [SWIDA] shall use the powers herein conferred upon it to assist in the development, construction[,] and acquisition of industrial, commercial, housing[,] or residential projects within Madison and St. Clair counties." (Emphasis added.) 70 ILCS 520/5 (West 1996).

The legislature conferred eminent domain powers as one of the ways SWIDA could meet this mandate. It did not expect SWIDA to launch industrial, commercial, or housing projects as publicly owned and operated enterprises. Clearly, the power to condemn property was conferred to assist in land acquisition for development projects engaged in by private venture capital.

No one expected entrepreneurs who acquired land through SWIDA's condemnation powers to develop that land for public, rather than private, use. Legislators simply expected those entrepreneurs to develop the land in ways that would put people to work, enhance the economic landscape, improve the quality and enjoyment of life, and increase government's ability to provide services to populace. This was the planned public purpose SWIDA's eminent domain powers were designed to achieve. The aim was for industrial, commercial, and housing development by private investors to advance societal interests through the widespread economic impact that development would create. The social and economic advantages that private development would offer the public at large were deemed a

proper vindication for land confiscation and ownership transfer. The legislature intended that individual property rights yield to this greater good. SWIDA's eminent domain powers were thus conferred to promote the legislature's quintessential public purpose advancement of the region's overall economic health.

When they granted SWIDA eminent-domain powers, legislators fully expected SWIDA to take private property from unwilling sellers and convey it to private developers. There was no other reason to confer those powers. Municipal and county governments could already exercise eminent domain for all other reasons. Moreover, legislators harbored no illusion that the developers who benefited from government-assisted land acquisition would be motivated by anything other than personal gain and profit. Clearly, the law that created SWIDA contemplated the precise action taken by SWIDA in this case.

This intent is apparent from the specific examples of commercial projects that SWIDA was to promote with the exercise of its eminent-domain powers:

"[A]ny project, including *** any cultural facilities of a for-profit *** type including but not limited to * * * racetracks, stadiums, convention centers, exhibition halls, arenas, opera houses and theaters, restaurants, velodromes, coliseums, sports[-]training facilities, parking facilities, * * * and port facilities." (Emphasis added.) 70 ILCS 520/3 (West 1996).

SWIDA acted as it was authorized and intended to act. It used eminent domain to promote a commercial project as that term was defined by our legislature. It facilitated the acquisition of land for a parking lot that would enhance a racetrack enterprise that offers unquestionable economic boon to the region. The social and economic advancement that a privately operated

racetrack in need of parking facilities could genenerate was the legislature's public-purpose justification for eminent-domain action. Therefore, SWIDA had the authority to exercise the right of eminent domain in the manner employed, and the power's use was constitutional if the statute that conveyed the power and intended such manner of use comports with the constitution. Since SWIDA's actions fit our legislature's design, we should address the legislative determination that economic development and advancement is a public purpose sufficient to validate the use of eminent domain powers. If such determination is constitutionally sound, SWIDA was empowered to do what it did.

Whether economic development and advancement constitutes a valid reason to take private property and convey it to different private interests is a question under current debate in all quarters of the country. See *Dean Starkman, Take and Give: Condemnation Is Used to Hand One Business Property of Another,* Wall St. J., Dec. 2, 1998, at A1. The more precise question is whether legislation can constitutionally authorize a government agency to take an owner's land and make it the private property of a new owner because the new owner is capable of putting the land to a more productive use or a use that better serves the broader social or economic interests of the public at large.

Until this question is resolved, owners of land next to private enterprises that attract people and make money, enterprises like casinos and racetracks, will continue to relinquish ownership rights to the social and economic progress that a private parking lot can define. Our pagination rules limit extensive scrutiny of this question. Nonetheless, its answer seems simple enough. If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private

capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.

The attraction of private venture capital is a worthy public goal, and the legislature provided SWIDA with numerous ways to accomplish it. While this legislation offers unquestionable potential for the kind of social and economic advancement that follows capital investment, it exceeds sacred parameters when it empowers SWIDA to lure private investors with the promise of any prime land those investors want to take.

This part of SWIDA's statutory power offers dubious progress. It is, after all, akin to the tyranny our forefathers fled. Our heritage stems in part from the aversion to the King's use of property to convey favor upon a privileged nobility. It betrays that heritage to rekindle the practice.

Article 1, section 15, of the Illinois Constitution forbids eminent domain's exercise for private use. Because I do not believe that economic development constitutes a public purpose that can vindicate eminent-domain's use to assist private developers, I think that SWIDA's condemnation powers contravene this constitutional imperative. For this reason, I specially concur. I also concur in the denial of the motion for contempt.

APPENDIX D

**IN THE CIRCUIT COURT FOR
THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS**

SOUTHWESTERN ILLINOIS
DEVELOPMENT AUTHORITY,
a municipal corporation,
Plaintiff.

vs.

NATIONAL CITY ENVIRONMENTAL, L.L.C.,
an Illinois Limited Liability Company,
ST. LOUIS AUTO SHREDDING,
a division of Pielet Brother Trading, Inc.,
an Illinois Corporation
and UNKNOWN OWNERS,
Defendants.

No. 98-ED-0006

**ORDER SETTING PRELIMINARY
JUST COMPENSATION**

This cause coming on to be heard on motion of plaintiff for the immediate vesting of fee simple title to plaintiff in a certain parcel described in Exhibit B of plaintiff's motion and it appearing to the Court that due notice of the time and place of hearing of said motion has been given to all parties interested therein and all parties being present and the Court having heard the evidence presented herein and the arguments of counsel and being in all respects fully advised; the Court having heard the representations herein and being in all respects fully advised in the premises;

THE COURT HEREBY FINDS, ADJUDGES AND ORDERS:

1. That the plaintiff has authority to exercise the right of eminent domain; that the property sought to be taken herein is subject to the exercise of such right; and that such right is not being improperly exercised in this proceeding;

2. That a reasonable necessity for taking the property exists in the manner requested in plaintiff's motion for quick take, described in detail by this Court on the record on April 23, 1998; and

3. That the amount constituting preliminary just compensation to the landowner, for the taking of fee simple title to the land herein mentioned to be $900,000.

ENTERED: 4-27-98

Judge John Goodwin

FILED
MAY 18 1998
CIRCUIT CLERK

FILED
MAY 2 9 1998
LOUIS E. COSTA
CLERK APPELLATE COURT. 5th DIST.

FILED OCT 8 1999
SUPREME COURT CLERK

**IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS**

SOUTHWESTERN ILLINOIS
DEVELOPMENT AUTHORITY.
Plaintiff.

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C. and
ST. LOUIS AUTO SHREDDING COMPANY.
Defendants.

No. 98-ED-0006

REPORT OF PROCEEDINGS

Before the HONORABLE JOHN M. GOODWIN

April 23, 1998

APPEARANCES:

MR. HARRY STERLING, Attorney at Law, for the Plaintiff.

MR. ROBERT BECKER, Attorney at Law, for Gateway International Motorsports Corp.

MR. JEFF PITZER, MR. JEREMY TAYLOR and MR.

DANIEL SCHATTNIK, Attorneys at Law, for the Defendants.

CYNTHIA M. FLURE, CSR
OFFICIAL COURT REPORTER
CSR License No. 084-002836

BE IT REMEMBERED AND CERTIFIED that heretofore, on to-wit: April 23, 1998, being one of the regular judicial days of this Court, the matter as hereinbefore set forth came on for hearing before the HONORABLE JOHN M. GOODWIN, Associate Judge in and for the Twentieth Judicial Circuit, State of Illinois, and the following was had of record, to-wit:

THE COURT: I'm ready to open the record.

When we left court yesterday the Court had stated its intent to look at the evidence and the exhibits and then rule on the — both the traverse and, if necessary, then on the quick take. Defendant traversed Plaintiff's petition with a motion to dismiss, arguing four theories.

In order I find that, first, the taking of the subject property does not violate the United States or Illinois constitutional provisions. A proper public purpose is being served here. I refer specifically to the unrebutted testimony of Southwestern Illinois Development's associate direct — executive director, Alan Ortbals, that the taking is, first, necessary for public safety. Included in this issue with the public safety is also the unrebutted testimony of Mr. Pritchett, a design and planning engineer from IDOT. Second, in Mr. Ortbals' testimony is the fact that he felt it was necessary for economic development and, third, to eliminate blight. I find the case of City of East St. Louis versus Gould out of our Fifth Appellate Court as instructive on this issue, and I follow its reasoning.

Further then, on the second theory or argument advanced by the Defense, I find that the taking of the subject property is not excessive. Scott Harding, a soil scientist and consulting engineer who performed an off-site analysis of the subject property, explained the necessity to mitigate wetland as a ratio of two to one after a consult with the Army Corps of Engineers. That, coupled with the overall plan for parking over a couple of years to promote public safety, is determinative of the issue of taking approximately 150 acres.

I find with respect to the third argument of the Defendant that the quick take is necessary under the facts brought out by the testimony these past few days. This is what we would call the necessary issue. Mr. Pielet has been unwilling for years to negotiate in a meaningful fashion. Meanwhile the economic benefits to the people of Madison and St. Clair County are at risk if the track is not able to effectively plan a future for such major events as the testimony revealed, that one of which is the Winston Cup, due to a shortage of land to handle parking. Carrying on litigation for one to two years, assuming the quick take weren't done, would result in the loss of such major events per the unrebutted testimony of Mr. Pook and others.

Finally with respect to Defendant's final argument, and that is the one on good faith, I find the Plaintiff has bargained in good faith. Failure of the Defendant to respond with a rejection or a counteroffer in a timely fashion is dispositive of this issue. I would direct the parties to The County of Wabash, another Fifth District case from 1993 located on page 5 on Plaintiff's pre-trial memorandum.

As we all know, when the Defendant files a traverse the burden of proof shifts to the Plaintiff. The Plaintiff has filed a petition for quick take, and with respect to

the petition for quick take, I find that the Plaintiff has met its burden of proof in this proceeding in two ways.

First, the admission into evidence of SWIDA's resolution and the resolution of the County Board of St. Clair County establishing a prima facie case. I would say see the cases cited at the Plaintiff's pre-trial memo, page 2, paragraph 2 as supportive of this proposition, which the Court follows that law, all of which — and that would be the resolutions of both SWIDA and the county board — stand unrebutted by Defendant in its case in chief.

Now the second reason the Court feels the Plaintiff has met its burden is by showing — by — that is by the Plaintiff showing in its case in chief through testimonial evidence and evidence admitted pursuant to exhibit that the statutory elements required for quick take have been proven and met in that case. Therefore, the Plaintiff's petition for quick take is granted.

I ask the parties to prepare themselves at this stage for the issue of valuation. I would ask that the Plaintiff proceed on that issue by calling its first witness with respect to valuation.

APPENDIX E

CONSTITUTION OF THE UNITED STATES

Amendment V:

No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF ILLINOIS

Article I § 15

Right of Eminent Domain

Private property shall not be taken or damaged for public use without just compensation as provided by law.

ILLINOIS STATUTES

ACT 520. SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY ACT

520/1. Short title

§ 1 This Act shall be known and may be cited as the "Southwestern Illinois Development Authority Act".

520/2. Legislative findings and declaration

§ 2. The General Assembly hereby determines and declares:

(a) That Labor surplus areas currently exist in the southwestern part of the State;

(b) That the economic burdens resulting from involuntary unemployment fall in part upon the State in the form of increased need for public assistance and reduced tax revenue and, in the event that the unemployed worker and his family migrate elsewhere to find work, may also fall upon the municipalities and other taxing districts within the areas of unemployment in the form of reduced tax revenues, thereby endangering their financial ability to support necessary governmental services for their remaining inhabitants;

(c) That the State has a responsibility to help create a favorable climate for new and improved job opportunities for its citizens by encouraging the development of commercial and service businesses and industrial and manufacturing plants within the southwestern part of the State;

(d) That a lack of decent housing con;ributes to urban blight, crime, anti-social behavior, disease, a higher need for public assistance, reduced tax revenue, and the migration of workers and their

families away from areas which fail to offer adequate, decent, affordable housing;

(e) That decent. affordable housing is a necessary ingredient of life affording each citizen basic human dignity, a sense of self worth, confidence and a firm foundation upon which to build a family and educate children;

(f) That in order to foster civic and neighborhood pride, citizens require access to educational institutions, recreation, parks and open spaces, entertainment and sports, a reliable transportation network, cultural facilities and theaters;

(g) That the main purpose of this Act is to promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State.

520/3. Definitions

§ 3. The following terms, whenever used or referred to in this Act, shall have the following meanings, except in such instances where the context may clearly indicate otherwise:

(a) "Authority" means the Southwestern Illinois Development Authority created by this Act.

(b) "Governmental agency" means any federal, State or local governmental body, and any agency or instrumentality thereof corporate or otherwise.

(c) "Person" means any natural person, firm, partnership, corporation, both domestic and foreign, company, association or joint stock association and includes any trustee, receiver, assignee or personal representative thereof.

(d) "Revenue bond" means any bond issued by the Authority the principal and interest of which is payable solely from revenues or income derived from any project or activity of the Authority.

(e) "Board" means the Southwestern Illinois Development Authority Board of Directors.

(f) "Governor" means the Governor of the State of Illinois.

(g) "City" means any city, village, incorporated town or township within the geographical territory of the Authority.

(h) "Industrial project" means (1) a capital project, including one or more buildings and other structures, improvements, machinery and equipment whether or not on the same site or sites now existing or hereafter acquired, suitable for use by any manufacturing, industrial, research. transportation or commercial enterprise including but not limited to use as a factory, mill, processing plant, assembly plant, packaging, plant, fabricating plant, office building, industrial distribution center, warehouse, repair, overhaul or service facility,freight terminal, research facility, test facility, railroad facility, solid waste and wastewater treatment and disposal site, and other pollution control facilities, resource or waste reduction, recovery, treatment and disposal facilities and including also the sites thereof and other rights in land therefor whether improved or unimproved. site preparation and landscaping and all appurtenances and facilities incidental thereto such as utilities, access roads, railroad sidings, truck docking, and similar facilities, parking facilities, dockage, wharfage, railroad roadbed, track, trestle, depot, terminal, switching and signaling equip-

ment or related equipment and other improvements necessary or convenient thereto. or (2) any land, buildings, machinery or equipment comprising an addition to or renovation, rehabilitation or improvement of any existing capital project.

(i) "Housing project" or "residential project" includes a specific work or improvement undertaken to provide dwelling accommodations, including the acquisition, construction or rehabilitation of lands, buildings and community facilities and in connection therewith to provide nonhousing facilities which are an integral part of a planned large-scale project or new community.

(j) "Commercial project" means an any project, including but not limited to one or more buildings, and other structures, improvements, machinery and equipment whether or not on the same site or sites now existing or hereafter acquired, suitable for use by any retail or wholesale concern, distributorship or agency, any cultural facilities of a for-profit or not-for-profit type including but not limited to educational, theatrical, recreational and entertainment, sports facilities, racetracks, stadiums, convention centers, exhibition halls, arenas, opera houses and theaters, waterfront improvements, swimming pools, boat storage, moorage, docking facilities, restaurants, velodromes, coliseums, sports training facilities, parking facilities, terminals, hotels and motels. gymnasiums, medical facilities and port facilities.

* * * *

520/4. Creation

§ 4. (a) There is hereby created a political subdivision, body politic and municipal corporation named the South-

western Illinois Development Authority. The territorial jurisdiction of the Authority is that geographic area within the boundaries of Madison and St. Clair counties in the State of Illinois and any navigable waters and air space located therein.

* * * *

520/5. Official acts—Duty to promote development

§ 5. All official acts of the Authority shall require the approval of at least 6 members. It shall be the duty of the Authority to promote development within the geographic confines of Madison and St. Clair counties. The Authority shall use the powers herein conferred upon it to assist in the development, construction and acquisition of industrial, commercial, housing or residential projects within Madison and St. Clair counties.

520/6. Powers

§ 6. (a) The Authority possesses all the powers of a body corporate necessary and convenient to accomplish the purposes of this Act, including, without any intended limitation upon the general powers hereby conferred, the following:

(1) to enter into loan contracts, agreements, and mortgages in any matter connected with any of its corporate purposes and to invest its funds;

(2) to sue and be sued;

(3) to employ agents and employees necessary to carry out its purposes;

(4) to have and use a common seal and to alter the same at its discretion;

(5) to adopt all needful ordinances, resolutions, bylaws, rules and regulations for the conduct of its

business and affairs and for the management and use of the projects developed, constructed, acquired and improved in furtherance of its purposes;

(6) to designate the fiscal year for the Authority;

(7) to accept and expend appropriations; and

(8) to have and exercise all powers and be subject to all duties usually incident to boards of directors of corporations.

(b) The Authority shall not issue any bonds relating to the financing of a project located within the planning and subdivision control jurisdiction of any municipalities or county unless: (1) notice including a description of the proposed project and the financing therefor, is submitted to the corporate authorities of such municipality or, in the case of a proposed project in an unincorporated area, to the county board; and (2) such corporate authorities do not, or the county board does not, adopt a resolution disapproving the project within 45 days after receipt of the notice.

(c) If any of the powers set forth in this Act are exercised within the jurisdictional limits of any municipality, all ordinances of such municipality shall remain in full force and effect and shall be controlling.

(d) To acquire, own, lease, sell or otherwise dispose of interests in and to real property and improvements situated thereon and in personal property necessary to fulfill the purposes of the Authority.

(e) To engage in any activity or operation which is incidental to and in furtherance of efficient operation to accomplish the Authority's primary purpose.

(f) To acquire, own, construct, lease, operate and maintain bridges, terminals, terminal facilities and

port facilities and to fix and collect just, reasonable and nondiscriminatory charges for the use of such facilities. The charges so collected shall be used to defray the reasonable expenses of the Authority and to pay the principal and interest of any revenue bonds issued by the Authority.

(g) Subject to any applicable condition imposed by this Act, to locate, establish and maintain a public airport, public airports and public airport facilities within its corporate limits or within or upon any body of water adjacent thereto and to construct, develop, expand, extend and improve any such airport or airport facility.

520/7. Bonds. notes or other evidences of indebtedness

§ 7. (a) The Authority, with the written approval of the Governor,shall have the continuing power to issue bonds, notes, or other evidences of indebtedness for the purpose of developing, constructing, acquiring or improving projects including without limitation those established by business entities locating or expanding property within the territorial jurisdiction of the Authority, for entering into venture capital agreements with businesses locating or expanding within the territorial jurisdiction of the Authority, for acquiring and improving any property necessary and useful in connection therewith, for the purposes of the Employee Ownership Assistance Act and any local government projects. With respect to any local government project, the Authority is authorized to purchase from time to time pursuant to negotiated sale or to otherwise acquire from time to time any local government security upon terms and conditions as the Authority may prescribe in connection therewith. For the purpose of evidencing the obligations of the Authority to repay

any money borrowed for any project. the Authority may, pursuant to resolution, from time to time issue and dispose of its interest bearing revenue bonds, notes or other evidences of indebtedness and may also from time to time issue and dispose of such bonds, notes or other evidences of indebtedness to refund, at maturity, at a redemption date or in advance of either, any bonds, notes or other evidences of indebtedness pursuant to redemption provisions or at any time before maturity. All such bonds, notes or other evidences of indebtedness shall be payable solely and only from the revenues or income to be derived from loans made with respect to projects, from the leasing or sale of the projects or from any other funds available to the Authority for such Purposes. The bonds, notes or other evidences of indebtedness may bear such date or dates, may mature at such time or times not exceeding 40 years from their respective dates, notwithstanding any other law to the contrary may bear interest at such rate or rates payable annually, semi-annually, quarterly or monthly, may be in such form, may carry such registration privileges, may be executed in such manner, may be payable at such place or places, may be made subject to redemption in such manner and upon such terms, with or without premium as is stated on the face thereof, may be authenticated in such manner and may contain such terms and covenants as may be provided by an applicable resolution.

* * * *

(g) The State of Illinois pledges to and agrees with the holders of the bonds and notes of the Authority issued persuant to this Section that the State will not limit or alter the rights and powers vested in the Authority by this Act so as to impair the terms of any contract made by the Authority with such holders or in any way impair the rights and remedies of such holders

until such bonds and notes, together with interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of such holders, are fully met and discharged. In addition, the State pledges to and agrees with the holders of the bonds and notes of the Authority issued pursuant to this Section that the State will not limit or alter the basis on which State funds are to be paid to the Authority as provided in this Act, or the use of such funds, so as to impair the terms of any such contract. The Authority is authorized to include these pledges and agreements of the State in any contract with the holders of bonds or notes issued under this Section.

* * * *

520/7.3 Bond issues for multiple projects

§ 7.3. The Authority may issue a single bond issue pursuant to this Act for a group of industrial projects, a group of housing projects, a group of residential projects, a group of commercial projects, a group of local government projects, or any combination thereof. A bond issue for multiple projects as provided in this Section shall be subject to all requirements for bond issue as established by this Act.

520/7.5. Tax exemption of bonds

§ 7.5. Tax exemption of bonds. The issuance of bonds under this Act is deemed an essential public and governmental purpose. Interest on the bonds issued under this Act after the effective date of this amendatory Act of 1996 is exempt from taxation within this State.

For purposes of Section 250 of the Illinois Income Tax Act, the exemption of the interest from bonds granted under this Section shall terminate after all of the bonds have been paid. The amount of such income that shall

be added and then subtracted on the Illinois income tax return of a taxpayer, pursuant to Section 203 of the Illinois Income Tax Act from federal adjusted gross income or federal taxable income in computing Illinois base income shall be the interest net of any bond premium amortization.

520/8. Acquisition of property and rights; eminent domain: project intergovernmental agreements; shared employees; municipal powers

§ 8 (a) The Authority may, but need not, acquire title to any project with respect to which it exercises its authority.

(b) The Authority shall have power to acquire by purchase, lease, gift or otherwise any property or rights therein from any person or persons, the State of Illinois, any municipal corporation, any local unit of government, the government of the United States and any agency or instrumentality of the United States, any body politic or any county useful for its purposes. whether improved for the purposes of any prospective project or unimproved. The Authority may also accept any donation of funds for it, purposes from any such source. The Authority may acquire any real Property, or rights therein, upon condemnation. The acquisition by eminent domain of such real property or any interest therein by the Authority shall be in the manner provided by the "Code of Civil Procedure." as now or hereafter amended including Section 7-103 thereof.

The Authority shall not exercise any quick-take eminent domain powers granted by State law within the corporate limits of a municipality unless the governing authority of the municipality authorizes the Authority to do so. The Authority shall not exercise any

quick-take eminent domain power granted by State law within the inincorporated areas of a county unless the county board authorizes the Authority to do so.

(c) The Authority shall have power to develop, construct and improve, either under its own direction or through collaboration with any approved applicant, or to acquire through purchase or otherwise any project, using for such purpose the proceeds derived from its sale of revenue bonds, notes or other evidences of indebtedness or governmental loans or grants and to hold title in the name of the Authority to such projects.

(d) The Authority shall have the power to enter into intergovernmental agreements with the State of Illinois, the counties of Madison or St. Clair, the Southwest Regional Port District, the Illinois Development Finance Authority, the Illinois Housing Development Authority, the Illinois Education Facilities Authority, the Metropolitan Pier and Exposition Authority, the United States government and any agency or instrumentality of the United States, the city of East St. Louis, any unit of local government located within the territory of the Authority or any other unit of governmerit to the extent allowed by Article VII, Section 10 of the Illinois Constitution and the Intergovernmental Cooperation Act.

(e) The Authority shall have the power to share employees with other units of government, including agencies of the United States, agencies of the State of Illinois and agencies or personnel of any unit of local government.

(f) The Authority shall have the power to exercise powers and issue bonds as if it were a municipality so authorized in Divisions 12.1. 74. 74.1. 74.3 and 74.5 of Article 11 of the Illinois Municipal code.

* * * *

520/13. Fees and charges

13. The Authority may collect fees and charges in connection with its loans, commitments and servicing and provide technical assistance in the development of the region.

Supreme Court, U.S.
FILED
AUG - 7 2002
OFFICE OF THE CLERK

No. 02-34

IN THE

Supreme Court of the United States

SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY,
Petitioner,

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C., and ST. LOUIS AUTO SHREDDING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to review a ruling of the Illinois Supreme Court, where that ruling was squarely based on the public use protections of Illinois's Constitution and prior case law.

2. Whether certiorari should be granted to review a ruling striking the proposed taking in this case, where that ruling was crafted to address (a) an atypical set of facts in which the condemning authority admitted that the taking was for a private developer's "private use" and (b) a statutory grant of quick-take authority that the Illinois legislature is permitting to expire at the end of August 2002.

RULE 29.6 STATEMENT

National City Environmental, L.L.C. has no parent corporations, and no publicly held company owns ten percent or more of its stock.

St. Louis Auto Shredding Company has no parent corporations, and no publicly held company owns ten percent or more of its stock.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

---

RESPONDENTS' BRIEF IN OPPOSITION

Addressing what amounted to a sale by the Southwestern Illinois Development Authority ("SWIDA") of its "quick-take" condemnation authority to a private developer seeking land to build a private parking lot to maximize its private corporate revenues, the Illinois Supreme Court held that taking to violate the "public use" protection of the Illinois Constitution. Review of that state-law ruling is beyond this Court's jurisdiction.

Even if the ruling below could be read as being based on the Fifth Amendment, and thus lacking an

"independent and adequate state ground," review still would not be warranted. Given the extreme and unusual facts of this case, the Illinois Supreme Court's ruling that the taking was not for a "public use" is unassailable. Because of those unique facts, a decision by this Court would have very limited precedential value.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to hear this case because the Illinois Supreme Court's decision rests upon adequate and independent state grounds. *See* Section I, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The primary constitutional provision at issue is Illinois Constitution art. I, § 15 (1970), which provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law." Because SWIDA argued below that the terms "public use" and "public purpose" were synonymous under Illinois law, also relevant is Illinois Constitution art. VIII, § 1(a) (1970), which uses the broader term "public purpose" rather than "public use": "Public funds, property or credit shall be used only for public purposes."

STATEMENT OF THE CASE

At the core of this litigation is the proposed condemnation of property owned by petitioners National City Environmental and St. Louis Auto Shredding (collectively "NCE"), through SWIDA's statutory "quick-take" authority. Gateway International Raceway ("Gateway"), a private corporation and NCE's neighbor,

initiated that condemnation after determining that it needed more parking to host bigger auto races and that it could expand its parking in the least expensive manner by paying SWIDA to condemn NCE's land. Gateway obtained SWIDA's pre-printed "quick-take" application form, indicated on this application that it is a "private developer" seeking to condemn NCE's land for its own "private use," and then paid SWIDA the fee SWIDA demands for condemning land for "private developers" for their own "private use." After executing a contract that allowed Gateway to specify the property to be condemned in exchange for paying not only SWIDA's fee but all of SWIDA's costs, including the just compensation and all attorneys' fees, SWIDA condemned NCE's property. The petition before this Court arises from the Illinois Supreme Court's determination that this sale of SWIDA's taking power exceeded its authority and violated the "public use" protections of the Illinois Constitution.

1. Background Facts.

For a quarter-century, NCE has operated a recycling center in its current location, employing between 80 and 100 people in recycling metals from old cars and appliances. The recycling process generates plastic and fabric waste materials, which are placed in NCE's environmentally sound landfill. Pet. App. A-3. In a year or two, when NCE fills its current landfill, it plans to move its landfill operations to an adjacent 148.5 acre site – the land that SWIDA sought to take here. *Id.* NCE also currently uses that site as a source of clay and dirt to cover and cap off the existing landfill. *Id.*

In 1987, the Illinois General Assembly created SWIDA, 70 ILCS 520/1 *et seq.* (the "SWIDA Act"), giving it certain powers, including the power to acquire property "upon condemnation" subject to the restrictions of the Illinois Eminent Domain Act. 70 ILCS 520/8(b). Originally, the SWIDA Act included an expedited version of the condemnation power called "quick-take." *See* 735 ILCS 5/7-103; *see also* 735 ILCS 5/7-103.70 (permitting SWIDA to exercise "quick-take" authority). The General Assembly chose not to reinstate that authority when it lapsed in September 1994, because SWIDA had abused that power. In 1995, the General Assembly decided to restore SWIDA's quick-take power, but did so only by placing certain new restrictions on that power. *See* 70 ILCS 520/8(b). According to the legislator who proposed the reinstatement, these additional restrictions were needed "to restore the public trust in this organization."[1] NCE Br. A-26.[2]

Gateway, NCE's neighbor to the east, was for years a small motorsports track. In 1994, after an ownership change, Gateway undertook a major expansion, including the building of the supporting infrastructure to

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1/ The General Assembly recently adjourned until November 7, 2002, without renewing SWIDA's quick-take authority, which expires on August 30, 2002. *See* Cynthia Wilson, *SWIDA Is Losing Its Quick-Take Authority*, St. Louis Post-Dispatch, July 22, 2002, at p. MC1.

2/ NCE's Brief on the Merits, filed with the Illinois Supreme Court on March 1, 2000, and the accompanying Appendix are cited herein as "NCE Br. __." NCE's Petition for Rehearing, filed with the Illinois Supreme Court on May 10, 2001, is cited as "NCE Pet. __." The trial transcripts below are cited, by volume, as "V_. __." Defense Exhibits are cited as "Def. Ex. __."

accommodate 50,000 spectators. Gateway sought and obtained over $21 million in financing assistance from SWIDA to facilitate this project. Pet. App. A-2 to A-3.

By early 1997, Gateway's expansion project was only a few months from completion. Suddenly deciding it lacked sufficient space for parking, in February 1997 Gateway asked SWIDA to condemn land belonging to Charles Lukas, an elderly local farmer. Pet. App. A-96. At the same time, Gateway treated SWIDA's Executive Director to free tickets to every major racing event in 1997 and hosted him at Gateway's Hospitality Suite at the Raceway. Def. Exs. 9, 10, 11; V1. 132-35.

Gateway's request, which SWIDA ultimately granted, was counter to SWIDA's policy at the time, which limited its takings to those requested by local governmental units. Consequently, SWIDA changed its policies to allow condemnations initiated at the behest of private parties. Pet. App. A-96. SWIDA's new "Quick-Take Application Packet" stated that SWIDA was willing to condemn property for "private uses," and set out a "schedule of fees" SWIDA would charge for such "private" condemnations. Pet. App. A-4, A-15; NCE Br. A-12. Although SWIDA charged no fee when the "government" applied for SWIDA to take land for a "public use," if a "private developer" asked SWIDA to take land for a "private use," the developer had to pay a "non-refundable" fee of $2,500 plus a "sliding scale fee" set at a percentage of the value of the subject property. Pet. App. A-4.

2. The Taking At Issue Here.

A year after the Lukas taking, Gateway decided that it wanted more parking to become eligible to seek a Winston Cup race for its racetrack. Pet. App. A-3. Gateway could have built a multi-level parking facility on its own property, but decided that doing so would be "too expensive" because such a facility "wouldn't be used enough to make it pay" for itself, despite the fact that this additional parking would enable Gateway to take in $13 to $14 million more in gate receipts annually. Pet. App. A-8, A-16. As SWIDA admitted at trial, the idea to condemn NCE's land was Gateway's – not SWIDA's. V1. 84.

On February 20, 1998, Gateway applied to SWIDA to quick-take NCE's land and convey it to Gateway for use as additional racetrack parking (for which it would charge the public). Pet. App. A-4; NCE Br. A-23. Gateway's application expressed no interest in alleviating traffic congestion, improving safety, or eliminating slums or blight. Instead, Gateway candidly stated that it sought NCE's land for use as a paid parking lot for the purpose of "further increasing the value of [Gateway's] racetrack." Pet. App. A-4, A-94; NCE Br. A-23. When asked at trial if he wanted NCE's land because he was trying to make money, Gateway's CEO answered: "Absolutely." V2. 114-15.

On March 5, 1998, SWIDA held a hearing on Gateway's request that SWIDA take NCE's property "for the purpose [according to SWIDA's own Notice of Hearing] of providing parking for Gateway." Pet. App. A-4 to A-5. At that hearing, SWIDA authorized the taking

of NCE's land for Gateway, including the filing of a "quick-take" action. *Id.* Before this hearing, SWIDA had not studied whether this taking would improve the local economy, whether it might alleviate safety problems, or whether it would eliminate slums or blight. Pet. App. A-15, A-97.

Before the March 5 hearing, SWIDA and Gateway had signed a contract in which SWIDA agreed to take NCE's land and convey title to Gateway. NCE Br. A-43. In this contract, SWIDA agreed to "utilize its eminent domain and quick-take authority" to condemn whatever land "may be desired . . . by Gateway" and to give that land to Gateway within five days. *Id.* SWIDA also agreed not to make any offer for NCE's land higher than any Gateway offer without obtaining Gateway's "prior written approval," and not to use any consultants or appraisers unless they were "approved by Gateway." *Id.*

In addition to SWIDA's $2,500 application fee, Gateway was to pay SWIDA a $60,000 "sliding scale fee," and $1 million to cover the potential acquisition cost of NCE's land (ultimately, whatever the jury found to be just compensation). Pet. App. A-4; V1. 88-89, 99-100. As SWIDA admitted, Gateway made these payments pursuant to SWIDA's fee schedule for takings by "private developers" for their own "private use." Pet. App. A-95. The contract also required Gateway to fund all of SWIDA's expenses in connection with the taking, including its legal fees. Thus, no public funds were used for this taking. Pet. App. A-4; NCE Br. A-43.

On March 17, 1998, almost a month after submitting its quick-take application to SWIDA, Gateway sent a letter to NCE offering $1 million for the 148.5 acre target property, $6,734 per acre, and giving NCE 48 hours to accept or reject the offer. Pet. App. A-5. Land immediately across Route 203 from the target property sold for over $250,000 per acre at about the same time. NCE declined the offer on March 19. *Id.* On March 20, 1998, with Gateway's approval and as an "extension" of Gateway's prior offer, SWIDA repeated the $1 million offer Gateway had made. *Id.* SWIDA also threatened to initiate a condemnation action on March 31, 1998 if NCE did not accept the offer by March 30. NCE did not accept, and SWIDA filed its condemnation action. Pet. App. A-5 to A-6.

3. Trial Court Proceedings.

The quick-take hearing began on April 21, 1998. On April 27, the circuit court denied the challenges raised by NCE, finding that SWIDA had the authority to take NCE's land and had exercised that authority properly. Pet. App. A-6. On April 30, following a preliminary compensation hearing, the circuit court adopted SWIDA's $900,000 valuation of NCE's land and ordered title in NCE's land transferred to SWIDA. Pet. App. A-8. NCE filed its notice of appeal and a stay motion that day. Pet. App. A-9. SWIDA quit-claimed the property to Gateway the same day. *Id.* Although the circuit court denied the stay, the Illinois Appellate Court issued one, thus preventing Gateway from paving the contested land.

4. The Illinois Appellate Court Proceedings.

The Illinois Appellate Court reversed, holding that SWIDA had "exceeded its constitutional authority" by taking NCE's property. Pet. App. A-100. The court noted that "in Illinois it is well settled that the courts have a right to render the final decision" on the question of public use. Pet. App. A-89. After analyzing the applicable Illinois precedent, the court stated that "[i]mplicit in the cases cited by both parties is the principle that though land can be taken for a proper public use, taking private property for private use under the law of eminent domain is in direct contravention of article 1, section 15, of the Illinois Constitution." Pet. App. A-99. Distinguishing this case from urban renewal cases, where Illinois law requires a finding of blight, which was never made in this case, the Court held that "[t]he expansion of Gateway parking is a private use, rather than a public use." *Id.*

5. The Illinois Supreme Court Proceedings.

Although the Illinois Supreme Court initially ruled for SWIDA by a vote of 4-3, a majority of the voting justices had joined the Court between oral argument and the decision. In light of that change in personnel, the Court granted NCE's petition for rehearing and heard oral argument again. On rehearing, the Court voted 5-2 to affirm the Appellate Court, and held that the exercise of the eminent domain power is "subject to the state constitutional mandate" that private property may only be taken for a "public use." Pet. App. A-1, A-9. The Court made clear that this question did not turn solely on

SWIDA's transfer of the targeted property to Gateway, but instead on whether that transfer served a public use:

> The essence of this case relates not to the ultimate transfer of property to a private party. Rather, the controlling issue is whether SWIDA exceeded the boundaries of constitutional principles and its authority by transferring the property to a private party for a profit when the property is not put to a public use.

Pet. App. A-11.

The Illinois Supreme Court concluded that the facts of this case compelled a ruling that the proposed taking was for a private, not a public, use. Pet. App. A-15 to A-16. The Court rejected SWIDA's argument that the taking was justified by safety concerns, "especially in light of evidence that Gateway could have built a parking garage structure on its existing property" to alleviate any claimed problems. Pet. App. A-13 to A-14. The Court also held that the record established that no slums and blight existed on the property. Pet. App. A-13. The Court held that SWIDA here acted solely for the benefit of Gateway:

> While the activities here were undertaken in the guise of carrying out its legislative mission, SWIDA's true intentions were not clothed in an independent, legitimate governmental decision to further a planned public use. . . . Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act

> as a default broker of land for Gateway's proposed parking plan.

Pet. App. A-15 to A-16.

The Court rejected SWIDA's argument that there is no distinction between the terms "public purpose" and "public use" – terms used distinctly in separate provisions of the Illinois Constitution. To the contrary, the Court held that this "distinction still exists and is essential to this case." Pet. App. A-12. Specifically, the Court held that the Illinois Constitution demands that "to constitute a public use, more than a mere benefit to the public must flow from the contemplated improvement." Pet. App. A-14 (quoting *Gaylord v. Sanitary Dist.*, 68 N.E. 522, 524 (Ill. 1903)). The Court thus reaffirmed that the Illinois public use doctrine requires that "[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right." Pet. App. A-13 (quoting *Gaylord*, 68 N.E. at 524). Because SWIDA's proposed taking of NCE's property did not meet this standard, it did not pass muster under the Illinois Constitution.

REASONS FOR DENYING THE PETITION

Because the decision of the Illinois Supreme Court rests on independent and adequate state grounds, this Court lacks jurisdiction to review it. A fair reading of the Illinois Court's opinion leaves no doubt that it was based on Illinois law and that Illinois law was not substantially affected by the Court's citation of federal cases. There is, therefore, no dispositive federal issue for this Court to consider.

Even assuming that the ruling below could be interpreted as resting on an interpretation of the federal Constitution, there is no reason for this Court to become involved. Review by this Court would serve little purpose because a decision based on the extreme and unusual facts shown here would have minimal precedential value. Certainly the Illinois Supreme Court's ruling does not call into question any traditional condemnations undertaken by public agencies exercising proper governmental functions.

Finally, on the merits, the Illinois Supreme Court did nothing controversial. If ever the "public use" limitation of the Fifth Amendment could come into play, this would be the case: where a governmental agency put its condemnation authority up for sale to a private corporation seeking property to enhance its private profits.

I. The Result Below Rests Upon The Illinois Supreme Court's Interpretation Of The Illinois Constitution.

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) ("[O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.") (quoting *Herb*, 324 U.S. at 125-26). That principle is fully applicable here. The Illinois Supreme Court plainly relied on Illinois state law interpreting the Illinois Constitution to bar an Illinois state agency from taking property to benefit a private corporation. Indeed, from the first words of its Analysis Section, the Court

made clear that it would decide this case on state law and relegate federal law to a subordinate role:

> The State of Illinois, as a sovereign, has the inherent right to condemn property, *subject to the state constitutional mandate* that private property shall not be taken or damaged for public use without just compensation to its owner. Ill. Const. 1970 art. I, § 15; *Forest Preserve District v. West Suburban Bank*, 161 Ill. 2d 448, 455 (1994). The fifth amendment to the United States Constitution (U.S. Const., amend. V), made applicable to the states through the fourteenth amendment (U.S. Const., amend. XIV), *also* provides that private property shall not be taken for public use without just compensation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 81 L. Ed. 2d 186, 191, 104 S. Ct. 2321, 2324 (1984).

Pet. App. A-9 to A-10 (emphasis added).

For the substance of its analysis, the Illinois Supreme Court relied on Illinois *state* cases interpreting the Illinois *state* Constitution. Specifically, the Court relied upon those state authorities in rejecting SWIDA's assertion that "any distinction between the terms 'public purpose' and 'public use' has long since evaporated and that the proper test is simply to ask whether a 'public purpose' is served by the taking," Pet. App. A-12. Instead, the Court held that "a distinction still exists and is essential to this case." *Id.*

That distinction is firmly rooted in the *Illinois Constitution*, which *does* distinguish between "public purpose" and "public use." The Illinois Constitution

specifies that some government actions need be justified only by a public *purpose*, while others require a public *use*. Article VIII, Section 1(a), governing the use of public money and credit, provides that "[p]ublic funds, property or credit shall be used only for *public purposes*." Ill. Const. art. VIII, § 1(a) (1970) (emphasis added). In contrast, the Illinois Constitution's Takings Clause mandates that "[p]rivate property shall not be taken or damaged for *public use* without just compensation." Ill. Const. art. I, § 15 (1970) (emphasis added).[3]

As the Illinois Supreme Court noted, Illinois courts have interpreted "public purpose" as a flexible, expansive phrase, but have insisted that the Illinois Takings Clause's

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3/ NCE vigorously argued the "public use" versus "public purpose" distinction under the Illinois Constitution to the Illinois Supreme Court. For example, NCE specifically asserted that in Illinois "[t]he term 'public purpose' has a broader scope than the term 'public use'":

> Even if some courts occasionally have used the terms "public use" and "public purpose" interchangeably, our State's Constitution uses the two terms quite distinctly: Article VIII, § 1(a), which governs the use of public money and credit, provides that "[p]ublic funds, property or credit shall be used only for public *purposes*." Ill. Const. art. VIII, § 1(a) (1970) (emphasis added). This language differs markedly from the takings clause, which mandates that "[p]rivate property shall not be taken or damaged for public *use* without just compensation." Ill. Const. art. I, § 15 (1970) (emphasis added). Thus, in Illinois, a "public purpose" cannot justify taking private property for a "private use."
>
> As discussed in NCE's Brief before this Court, the distinction that our Constitution draws between "public use" and "public purpose" makes a material difference in this case. (NCE Br. 28-33.)

NCE Pet. 19-20.

"public use" requirement is satisfied only when the public is "to some extent entitled to enjoy the property, not as a mere favor or by permission of the owner, but by right." Pet. App. A-13 (quoting *Gaylord v. Sanitary Dist.*, 68 N.E. 522, 524 (Ill. 1903)). Following this interpretation of the Illinois Constitution, the Illinois Supreme Court here ruled that the taking at issue did not satisfy Illinois's public use requirement because, under Illinois law, "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement." Pet. App. A-14 (quoting *Gaylord*, 68 N.E. at 524).

The Illinois Supreme Court also ruled that the taking in this case was not for a public use because "members of the public are not the primary intended beneficiaries of this taking." Pet. App. A-14 to A-15. In so concluding, the Court relied heavily on its decision in *Limits Industrial Railroad Co. v. American Spiral Pipe Works*, 151 N.E. 567 (Ill. 1926), which held that a railroad could not exercise eminent domain authority to acquire property for the purpose of expanding its facilities because the taking "principally benefitted the railroad itself and a few other business entities." Pet. App. A-14.

Accordingly, the only reasonable reading of the case at bar is that the Court rested its ruling entirely on state law. Nor is the challenged decision "interwoven" with federal law so as to confer jurisdiction upon this Court. *See Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996) (Pennsylvania Supreme Court decision was interwoven with federal law because, although that court discussed several of its own decisions, some of those cases relied on federal precedent); *Milkovich v. Lorain Journal Co.*, 497

U.S. 1, 10 n.5 (1990) (Ohio Supreme Court decision was interwoven with federal law because the state court precedent on which it relied in turn "relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants").

In contrast, the state precedents on which the Illinois Supreme Court relied do not turn on federal law. *Gaylord* contains only a single reference to federal case law – within a citation from a treatise discussing cases from various non-Illinois jurisdictions for a point *unrelated* to the public use question. 68 N.E. at 524-25. Moreover, the *Gaylord* opinion repeatedly emphasizes that that decision is rooted in the Illinois Supreme Court's interpretation of *Illinois* law. For example, it states explicitly:

> It is also the settled doctrine *of this court* that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.

Id. at 524 (emphasis added). *Gaylord* concludes:

> We are clearly of the opinion that, in so far as the statute of 1872 attempts to authorize the condemnation of private property for the purposes of public mills or machinery other than public gristmills, it is violative of that provision of *our Constitution* which declares that private property shall not be taken or damaged for public use without just compensation, the meaning of which is that private property shall be

> taken for no other than a public use, and then only upon the payment of just compensation . . . .

Id. at 526 (emphasis added). Plainly, *Gaylord* is based entirely on the Court's interpretation of the Illinois Constitution.

Likewise, *Limits Industrial* – which the Illinois Supreme Court described as "strikingly similar" to this case in that the taking at issue ran afoul of the public use requirement because it principally benefitted private entities, Pet. App. A-14 – contains not a single citation to federal law. There can be no question that *Limits Industrial*'s interpretation of the public use requirement is based wholly on the Illinois Constitution.

The fact that the Illinois Supreme Court's opinion also cites to five of this Court's cases – two merely as part of a string cite – does not mean that its decision rests upon federal law. This Court looks beyond federal case citations to identify the basis for a state court's decision and refuses review if that basis is an independent and adequate state ground: "[W]e should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956); *see California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J., in chambers) (finding that a decision rested on independent and adequate state grounds where "[d]iscussion of federal law – specifically the First Amendment – is strictly confined to the second subsection and constitutes an independent, alternative holding"). Applying this principle, this Court ruled that an Indiana Supreme Court decision rested upon an independent and adequate state

ground, even where the decision cited both federal and state cases, because "the organization and language of the opinion" indicated that the state court relied on state law. *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 491 (1965).

The Illinois Supreme Court cited these few federal cases – typically in conjunction with state precedent – for unremarkable background information concerning governmental takings powers generally.[4] Indeed, the dissent criticizes the Court's opinion for not hewing to this Court's precedents. Pet. App. A-29 to A-30. The Illinois Supreme Court, however, is within its authority to require a creature of Illinois statute seeking to condemn Illinois property to conform to Illinois law. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 291-93 (1982) (holding that a state court may read the state constitution

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4/ *E.g.*, Pet. App. A-10 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), for proposition that federal Constitution, like Illinois Constitution, provides that private property shall not be taken for public use without just compensation and that transfer of property taken by eminent domain to private ownership does not by itself render the taking unconstitutional); Pet. App. A-10 to A-11 (citing *Berman v. Parker*, 348 U.S. 26 (1954), for statement that takings for public use are permissible under the constitutionally exercised police power of the government); Pet. App. A-11 (citing *Berman*, 348 U.S. at 31-32; *Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925); and *United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946), for principle that deference should be afforded legislature's grant of eminent domain authority); Pet. App. A-11 (citing *Midkiff*, 467 U.S. at 241, for fact that exercise of eminent domain power is not beyond judicial scrutiny); Pet. App. A-17 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982), for proposition that "the government does not have unlimited power to redefine property rights").

as providing greater protections for individual rights than the federal Constitution).

It is true that where "a state court decision fairly appears to rest primarily on federal law," this Court will assume that it does absent a plain statement to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (emphasis added). But where it does *not* "fairly appear that the state court rested its decision primarily on federal law," that presumption does not apply. *Coleman v. Thompson*, 501 U.S. 722, 736 (1991) (internal citation and quotation omitted); *see Harris v. Reed*, 489 U.S. 255, 261 (1989) (describing *Long* presumption as applying only in those cases in which it fairly appears that state court rested its decision primarily on federal law). A fair reading of the Illinois Supreme Court's opinion reveals that its decision stemmed wholly from its application of its own precedent interpreting its own Constitution. Hence, the *Long* presumption is inapposite here.

Finally, this Court will not review a case where, even after it corrected any misapprehension of federal law, a state court would render the same decision on remand. *Freeman*, 488 U.S. at 1314. That would happen here. As the Illinois Supreme Court found, the taking below neither permitted use of the property by the public as of right nor principally benefitted the public, two requirements that the Illinois Constitution imposes for a taking to be for a public use. Pet. App. A-13 to A-15. Therefore, even if this Court were to grant certiorari and hold that the taking was permissible under the federal Constitution, it still would run afoul of the Illinois Constitution, as the Illinois Supreme Court recognized. Certiorari should be denied.

II. This Highly Fact-Specific Case Does Not Present Any Broad-Reaching Issues Of Law.

Even assuming that the decision below could be interpreted as resting on federal law, there would be no persuasive reason for this Court to review it. This Court has refused to adopt a bright-line test for what is and is not a "public use," expressly because this Court has recognized that the public use determination is *fact-specific*, as "each case must turn on its own facts." *Berman v. Parker*, 348 U.S. 26, 31-32 (1954); *see also* Pet. App. A-11 (quoting same).

The uniqueness of the facts shown here cannot be denied. As the Illinois Supreme Court explained, *SWIDA's own application form* accurately described this taking as one undertaken at the request of a "*private developer*" for that developer's "*private use*." Pet. App. A-15 (emphasis added). The following highly unusual facts also informed that Court's analysis:

- "SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the racetrack."
- "SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers."
- "SWIDA entered into a contract with Gateway to condemn whatever land 'may be desired . . . by Gateway.'"

- The taking had no basis in SWIDA's economic planning function, but rather "was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price."

- Gateway "could have built a parking garage structure on its existing property," but the cost of doing so was "substantially higher" than that of building an open field parking lot on land taken by SWIDA from NCE.

See Pet. App. A-15 to A-16.

Even were there some room for doubt whether these extreme facts suffice under federal law to render the taking a non-public use (there is not, *see* Section III *infra*), a ruling based on these facts would not elucidate the application of the Takings Clause to normal governmental operations. Governments very seldom broadcast a willingness to do the bidding of private companies for a set price, dressing up actions only after the fact as measures promoting public safety and economic development. The proper constitutional treatment of that atypically inappropriate governmental behavior simply is not a question of general import. *See Taggart v. Weinacker's Inc.*, 397 U.S. 223, 225 (1970) (dismissing certiorari as improvidently granted where legal question was "overshadowed by the special facts of the case").

III. The Ruling Of The Illinois Supreme Court Is Consistent With Case Law From This Court And Other Jurisdictions.

The unique facts of this case, on which the Illinois Supreme Court relied, easily distinguish this case from those of this Court and other states cited by SWIDA as "conflicting." Pet. 11-18. Moreover, SWIDA is incorrect in its assertion that other states have forsaken the public use protections afforded landowners – though Illinois need not conform its decisions to those of other states. Pet. 16-17. In fact, numerous comparable rulings have been issued in other states.

Trying to make this decision appear aberrant, SWIDA first compares this case to cases that involved the elimination of slums and blight. *See Berman*, 348 U.S. 26 (upholding constitutionality of District of Columbia blighted areas redevelopment statute); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 962 P.2d 543 (Kan. 1998) (taking pursuant to Kansas's tax increment financing ("TIF") statute). But as the Illinois Supreme Court specifically found, "we are not dealing with a taking for the purposes of eliminating slums or blight." Pet. App. A-13.

Indeed, the facts reveal that SWIDA here did not act pursuant to Illinois's Blighted Areas Redevelopment Act, 315 ILCS 5/1 *et seq.*, or its Tax Increment Allocation Redevelopment Act, 65 ILCS 5/11-74.4-1 *et seq.*, both of which provide carefully crafted legislative safeguards for finding that blight exists. The "blight" cases SWIDA cites differ in this factual respect as well. *See Berman*, 348 U.S. at 29-30, 35-36 (detailing procedural requirements of the

District of Columbia's blighted areas act); *Tomasic*, 962 P.2d at 557 (noting that taking under Kansas's TIF Act had to follow extensive "safeguards" designed "to check any abuse of executive power").

The other case on which petitioner primarily relies is *Midkiff*, but that case is significantly different as well, both procedurally and substantively. First, unlike here, where the Court is being asked to review a single abusive taking invalidated by a state supreme court, *Midkiff* involved invalidation by a federal court of an entire state legislative scheme. Far from trampling on legislative authority, the decision at issue here is fully consistent with the Illinois Eminent Domain Act, which the General Assembly requires SWIDA to follow. *See* 70 ILCS 520/8(b). That Act not only contemplates judicial oversight of takings, but provides Illinois courts with the power to remedy unauthorized takings by ordering a condemnor defeated on appeal to pay the landowner's costs and legal fees. *See* 735 ILCS 5/7-111; 735 ILCS 5/7-123.

Moreover, *Midkiff* addressed the constitutionality of the Residential Leaseholds Act of 1967, legislation intended to break up the oligopoly of Hawaii's land ownership structure, which still reflected the pre-statehood feudal practice in which a single high chief owned all of the land. 467 U.S. at 232. The Illinois Supreme Court addressed a decision by a local political authority to take property from one business and give that property to a second business that had developed a cozy relationship with the authority, for the purpose of enhancing its already-considerable private corporate profits. The justification that was sufficient in *Midkiff* thus differs

dramatically from the absence of legitimate justification shown here.[5]

Other states have rejected takings where, as here, the condemning body has no actual interest in the target property other than to convey title to a private party. In *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 233-34 (Del. 1986), for example, the Delaware Supreme Court rejected a taking by a Parking Authority for a public parking facility, where the Authority intended to transfer a substantial portion of the target property to a private company, because the "paramount benefit" of the taking was going to a private company. *See also City of Center Line v. Chmelko*, 416 N.W.2d 401, 403-07 (Mich. Ct. App. 1987) (striking taking where City claimed that it sought to condemn property "for commercial purposes in a manner that will improve the economic viability of the existing commercial district," when in fact it intended to convey condemned land to auto dealership that wanted to expand its parking space).

Similarly, in *Port Authority v. Groppoli*, 202 N.W.2d 371, 372 (Minn. 1972), a private company sought to acquire waterfront property for warehouse use. Rather than negotiate to purchase the property from the landowner, the company convinced the Port Authority to condemn the property and make it available by lease. The

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5/ SWIDA also cites *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), merely for the proposition that it "reaffirmed" the "*Berman/Midkiff* analysis." Pet. 13. That *National Railroad* did not overturn *Berman* or *Midkiff* is unremarkable – particularly given that it was decided under federal law *alone* – and adds nothing to SWIDA's Petition.

Authority did just that, and prevailed over the landowner at trial. The Minnesota Supreme Court reversed, holding that it was obligated "to prevent an abuse of discretion in those cases where an owner's constitutional rights are threatened by a proposed taking for a private rather than a public purpose." *Id.* at 375. The Court concluded that "[t]his is such a case," because the principal beneficiary of the taking would be a single private corporation. *Id.*; *see also Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 943 (Miss. 1994) (taking rejected where private company paid the City over $4 million to acquire property on ground that the "private use of [the] property . . . will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best"); *City of Statesville v. Roth*, 336 S.E.2d 142, 144 (N.C. Ct. App. 1985) (striking condemnation and holding that a private citizen's land "cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community") (quoting *State Highway Comm'n v. Thornton*, 156 S.E.2d 248, 260 (N.C. 1967)).

In sum, there is no basis for petitioner's hyperbolic claims that the Illinois Supreme Court has defied governing constitutional principles. Even assuming that the Court's decision rested on federal law, the federal "public use" requirement is doubtless violated where a governmental entity essentially sells its condemnation power to private parties, without exercising any real oversight over when and why that power is used.

IV. The Illinois Legislature's Refusal To Renew SWIDA's Quick-Take Power Weighs Against Review.

The Illinois General Assembly recently concluded its session without renewing SWIDA's quick-take power, which lapses August 30, 2002. 735 ILCS 5/7-103.70; *see also* Cynthia Wilson, *SWIDA Is Losing Its Quick-Take Authority*, St. Louis Post-Dispatch, July 22, 2002, at p. MC1. Far from objecting to the Illinois Supreme Court's decision to invalidate SWIDA's exercise of quick-take authority, the General Assembly has ratified that decision by refusing to allow SWIDA to continue to exercise quick-take authority. In other words, the Petition in this case does not represent the State of Illinois, through its legislature or Attorney General, seeking to vindicate its takings powers or seeking guidance for future takings. Rather, it is Gateway, the private corporation paying counsel's fees and expenses, to whom SWIDA is contractually bound, seeking one last chance to obtain its inexpensive parking lot from NCE.

In *Taggart*, 397 U.S. at 224-25, this Court dismissed as improvidently granted a writ of certiorari where changed circumstances did not moot the controversy but relieved "the threat of grave state-federal conflict that we need sit to resolve." Although this case presents no issue worthy of this Court's review, SWIDA's loss of the statutory quick-take power at issue is another, prudential reason to deny the writ.

CONCLUSION

The petition for a writ of certiorari should be denied.

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August 7, 2002

Supreme Court U.S.
FILED
AUG 7 2002
OFFICE OF THE CLERK

No. 02-34

In the

Supreme Court of the United States

SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY,

Petitioner,

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C. AND ST. LOUIS AUTO SHREDDING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Illinois Supreme Court, in ruling that petitioner's exercise of eminent domain was unconstitutional, disregard the holdings in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), and create a conflict with decisions in many other states, (a) by improperly substituting its judgment for that of the legislature in determining that the proposed use of the condemned property after the taking was not a public use; (b) by holding that the use of property taken by eminent domain is not a public use unless after the taking the general public has the use or enjoyment of the property as of right; and (c) by holding that a taking of property for economic redevelopment is unconstitutional if private business will earn a profit from the post-taking use of the property?

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INTEREST OF THE *AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA has more than 1400 members and is this nation's oldest and largest professional organization for municipal attorneys. IMLA acts as the legal voice for this nation's local governments. It is the only organization on the national level devoted exclusively to the needs of the local government legal community. Its mission is to serve local government lawyers and advance the interests of local government law. To this end, it actively pursues the development of fair and realistic legal solutions to the problems that constantly confront our cities, towns and villages. IMLA publishes a number of materials and newsletters designed to help municipal lawyers, including the *Municipal Lawyer*, a magazine comprised of topical articles on municipal law and practice.[1]

SUMMARY OF THE ARGUMENT

The issues presented to the Court in this case go to the heart of municipal law as they concern the limits of power of government to take property from one private landowner and transfer it to another private owner in order to promote the public good through economic development. These issues affect every municipal attorney and municipality in the United States. While there is no question that there are constitutional limits on the power of local governments to

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[1] Monetary contributions were made to facilitate the preparation of this Brief by Madison County, Illinois, St. Clair County, Illinois and the City of Madison, Illinois. Both the Petitioner and the Respondent have consented to the filing of this Amicus Brief and their consents have been filed herewith.

take property in this manner, there is similarly no question that the powers of local governments to condemn private property for public use have been greatly expanded to allow condemnation of private property for use by another private party where the purpose of the taking achieves a valid public purpose. The case before the Court contains facts that squarely present the issues and provides the Court an opportunity to clarify and resolve the question of whether the Public Use Clause of the Fifth Amendment allows government to condemn private property for economic development when the property is transferred to another private party.

The taking of property from one private property owner and transferring it to another presents an important Constitutional question on the scope of governmental power in eminent domain. This case has caught the attention of the media and legal scholars, with one set of writers stating, "Perhaps no case has presented as extensive an examination of eminent domain to promote private economic interests as the judicial rollercoaster known as *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.* The case presented a law school examination question of the limits of eminent domain." Timothy S. Hollister & Amy E. Souchuns, "*Eminent Domain and Condemnation, How Far Is Too Far?*" Address Before International Municipal Lawyers Association 2002 Mid-Year Seminar, April 23, 2002 at 16-19. *See also* THE WALL STREET JOURNAL, Apr. 5, 2002, at B2; THE WALL STREET JOURNAL, July 23, 2001, at B1.

Municipal attorneys have come to rely on this Court's rulings, which have widely been interpreted as providing a broad-based spectrum of permissible public purposes that justify and permit eminent domain powers, including the power to take private property from one person and convey it to another to accomplish the goals sought. *Berman v.*

Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). This Court established that it is the legislature's duty to determine what constitutes a public purpose and it is not the role of the judiciary to substitute its view for that of the legislature. The Illinois court's ruling in this case calls into question, not only the role of the judiciary in reviewing takings cases, but what public purposes will satisfy constitutional requirements in order to provide a valid basis for condemnations in the future. This is a major concern for all local government attorneys because the Illinois court's decision has created uncertainty. It is no longer clear to what extent the Public Use Clause of the Fifth Amendment restricts the exercise of the government's eminent domain power.

Surely it is an anachronistic view to equate public use with a requirement for free access for all members of the public. Yet, that seems to be the road some state courts are following. This is despite the fact that this Court has previously determined that economic redevelopment is a valid public purpose that satisfies the Public Use Clause requirement and that taking property from one private landowner and conveying it to another in order to alleviate blighted neighborhoods is permitted. *Berman*, 348 U.S. 26. The question is, should eminent domain powers used for redevelopment and development policies be limited strictly to cases involving slums and blighted areas? The *amicus* submits that the precedent set by this Court does not warrant such a narrow view. Public purposes can be achieved through other developmental goals in areas that are not blighted.

This issue is of great concern to all units of local governments because the Illinois decision, if followed, will handcuff local officials, and prevent them from condemning property for economic redevelopment when such develop-

ment is to be accomplished primarily by private enterprise. Having private enterprise assist in redevelopment projects is often the only way a redevelopment project can be accomplished. It is self-evident that when private enterprise is used the public coffers are preserved, which is a benefit in itself. Moreover, this Court has found that once the public purpose has been established the means of executing the project are for the legislature alone to determine. *Berman*, 348 U.S. 26, 33.

The state court decision conflicts with the precedent of this Court, and many other state courts, by placing unwarranted restrictions on the Public Use Clause for takings conducted to facilitate economic development projects. If the state court decision is allowed to stand, local governmental entities will face general confusion and indecision regarding their ability to advance economic development projects through condemnation proceedings. Accordingly, municipal governments have a substantial interest in the proper resolution of the important federal question that is presented in the petition. This Court should grant review.

ARGUMENT

I. THE LEGISLATIVE DETERMINATION OF PUBLIC USE IS ENTITLED TO GREAT DEFERENCE.

In *Berman v. Parker*, 348 U.S. 26 (1954), the Court set forth the role of the judiciary in reviewing a legislature's public use determination. The *Berman* Court acknowledged that the courts play a role in determining whether eminent domain power is exercised for a public purpose, but made clear that the judiciary's role is "an extremely narrow one . . . (and that) deference to the legislature's 'public use' determination is required until it is shown to involve an impossibility". *Berman*, 348 U.S. at 32. The Court made clear that once the legislature's public use determination is

made, the means by which that public use will be attained is also within the legislature's discretion, and it is not within the role of the judiciary to substitute its judgment for that of the legislature. *Berman*, 348 U.S. at 33-34.

This Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), expounded upon *Berman's* limitations on the judiciary, stating that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *Midkiff*, 467 U.S. at 240-41, *quoting United States ex rel. TVA v. Welch,* 327 U.S. 546, 552 (1946). The *Midkiff* Court observed that as long as the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held that a compensated taking violated the Public Use Clause. *Midkiff*, 467 U.S. at 240-41. In short, the Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use, "unless the use be palpably without reasonable foundation." *Id.*, *citing United States v. Gettysburg Electric R. Co.*, 170 U.S. 668, 680 (1896).

The enabling act in the instant case created petitioner, Southwestern Illinois Development Authority (SWIDA), and empowered it to promote commercial, residential, service, transportation, and recreational activities and facilities. 70 ILCS 520/2(g) (A-114). SWIDA was authorized by the act to promote development projects, including for-profit racetracks and parking facilities. 70 ILCS 520/3(j) (A-116); 720 ILCS 520/5 (A-117). In the instant case, the state legislature made a public use determination that development would reduce unemployment and enhance the public welfare of the region. 70 ILCS 520/2(g) (A-114). Subsequently, SWIDA determined there were substantial rea-

sons to exercise its taking power to condemn respondent's property for use as a parking facility at an auto racetrack. (A-20). This being done, the Illinois Supreme Court was bound to defer to the legislative determination that the taking was to serve a public use. *See Midkiff*, 467 U.S. at 244. By refusing to defer to the legislature's public use determination, the Illinois Supreme Court's decision directly conflicts with prior decisions of this Court, including *Berman* and *Midkiff*

The Illinois Supreme Court acknowledged that the particular taking would benefit the public by alleviating traffic and addressing public safety concerns. (A-13) The state court also recognized the taking could contribute to positive economic growth in the region. (A-13-14) Despite recognizing the public purpose in this case, the Illinois Supreme Court nevertheless determined that the taking violated the Public Use Clause. In doing so, the state court incorrectly interpreted, or otherwise rejected, prior decisions of this Court.

The court's intrusion into the legislative domain in this case signals an erosion of eminent domain powers that, if upheld, could result in courts operating as regional planning boards free to substitute their own decision of what the best manner for development should be. Evidence would then be necessary in every case to prove that the government's plan for development is economically better than some alternative plan. This would result in time-consuming litigation, which would only serve to impede the objectives sought in the redevelopment. As noted above, this is a practice which this Court has determined "has proved impracticable. . ." *Midkiff*, 467 U.S. at 240-41.

It is also significant that the Illinois court did not expressly challenge the valid public purpose associated with the racetrack itself, but instead confined its review to the public benefits of the parcel taken for use as a parking lot.

Indeed, the economic development benefits to the area of the racetrack in the three years it had been operating had been substantial, and economic development had clearly been achieved through the development. As one set of commentators put it, ". . . if the initial development of the Gateway racetrack *per se* was a legitimate authority for SWIDA, why not also additional parking?" *See* Timothy S. Hollister & Amy E. Souchuns, *"Eminent Domain and Condemnation, How Far Is Too Far?,"* Address Before International Municipal Lawyers Association 2002 Mid-Year Seminar, April 23, 2002 at 16-19. If courts are allowed to scrutinize each individual parcel taken in a multi-parcel project to determine whether the public use is promoted by that taking alone, the process will not only become unwieldy and unmanageable, the objectives of the project as a whole will be lost.

This type of analysis should not be condoned, as this Court pointed out in *Berman*, 348 U.S. at 35, when it found that an individual parcel of property that was not itself "blighted" could be condemned in order to develop a project to alleviate blight in the area. That is a matter that should be determined by the legislature not the judiciary. This principle has become blurred. That is why it is important for the Court to grant the Petition For Certiorari in this case.

II. THE STATE COURT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT BECAUSE IT ADDS A REQUIREMENT TO THE PUBLIC USE ANALYSIS THAT THIS COURT HAS EXPRESSLY REJECTED.

The decision of the Illinois Supreme Court grafts onto the public use doctrine the requirement that a condemned property must be put into free use for the public. In its opinion, the Illinois Supreme Court relied on a 1903 case in

holding that "[t]he public must be to some extent entitled to use or enjoy the [condemned] property, not as a mere favor or by permission of the owner, but by right." (A-13). Based on this requirement, the Illinois Supreme Court determined that the subject taking violated the Public Use Clause because the public did not have the right to use the condemned property since they would be forced to pay a parking fee. *Id.* at 238.

By requiring that the public have a right to free use of condemned property, the Illinois Supreme Court's decision directly conflicts with the decision of this Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229. In *Midkiff*, the Court stated that it had "long ago rejected any literal requirement that condemned property be put into use for the general public." *Midkiff*, 467 U.S. at 244. The Court stated further that "[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Midkiff*, 467 U.S. at 244, quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923).

There is no requirement that the public, or even the government, use condemned property to legitimize a taking. Rather, it is only the taking's purpose, and not the mechanics of the taking, which must pass scrutiny under the Public Use Clause. *Midkiff*, 467 U.S. at 244. Accordingly, the decision of the Illinois Supreme Court directly conflicts with the decision of this Court.

III. THE ILLINOIS SUPREME COURT'S PUBLIC USE DOCTRINE, ALREADY CITED BY ONE COURT AS THE "NATIONAL TREND," ILLUSTRATES THE CONFLICT AMONG THE STATES IN THE APPLICATION OF *BERMAN* AND *MIDKIFF*.

The Illinois Supreme Court acknowledged that the subject taking could result, in addition to other public benefits,

in increased revenues to the region. (A-14). Notwithstanding this finding, the state court determined that the public benefit of revenue expansion did not justify the use of eminent domain power in the instant case. *Id.* Specifically, the state court found the taking an "improper and unacceptable expansion of the eminent domain power of the government." *Id.*

A review of the judicial construction of the Public Use Clause demonstrates that the use of eminent domain powers to expand revenues and spur other economic development is indeed proper. This Court in *Berman*, upheld the condemnation of a non-blighted property for the purposes of redeveloping the larger area. *Berman*, 348 U.S. at 34-36. As the *Berman* Court stated regarding the public use requirement, "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as *monetary*. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, *well-balanced* as well as carefully patrolled." *Berman*, 348 U.S. at 33 (emphasis added).

Other state high courts have come to the same conclusion. For example, in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 629, 304 N.W.2d 455, 457 (1981), the Michigan Supreme Court reviewed the use of eminent domain to acquire and convey property to General Motors Corporation for construction of an automobile assembly plant. The eminent domain power authority was exercised pursuant to the Michigan Economic Development Corporations Act, a statute similar to that at issue in *Berman*. The Act declared that:

> There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local in-

> dustrial and commercial enterprises, including employee-owned corporations, to strengthen and revitalize the economy of this state and its municipalities . . . therefore, the powers granted in the act constitute the performance of essential public purposes and functions for this state and its municipalities. Mich Comp. L. Ann Sec. 125.1602.

In upholding the condemnation, the Michigan Supreme Court deferred to the state legislature's public use determination that the public would be the primary beneficiary of the condemnation because it would promote economic development, reasoning that "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need." *Poletown*, 410 Mich. at 634-35, 304 N.W.2d at 459-60.

In addressing the meaning of the "public use", the court indicated that a "public use changes with changing economic conditions of society and that the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private." *Poletown*, 410 Mich. 616 at 619, 304 N.W.2d at 457. The court concluded that in order to promote the general economic welfare of the people, the municipal taking of private property of some to provide land for the future development and expansion of General Motor's manufacturing facility was a valid exercise of the power of eminent domain. The court ruled based on its understanding of *Berman,* and other state precedents, in equating public use with public benefit and in ruling that "the determination of what constitutes a public purpose is primarily a legislative function". *Id.* at 459.

The facts in *Poletown* are similar to those in the Illinois case in that the legislatures made a determination of a valid public purpose, and both determined the need for

economic development by the private sector as a means to improving the economic conditions in the areas in question. If anything, the facts in *Poletown* indicate a use that was more private than that in the Illinois case. In the latter the public benefited by economic revitalization as well as the provision of entertainment and recreational facilities, namely, a racetrack, to which they were invited to come and view automobile races. The decisions of the court could not, however, be more divided. The Michigan court adopted this Court's view as stated in *Berman*, that when a legislature speaks, the public interest has been declared in terms, "well-nigh conclusive." 304 N.W.2d at 459, citing *Berman*, 348 U.S. 26, at 32. The Illinois court found the condemnation to be for the benefit of private interests. Clearly there is a split of authority on this issue that needs to be resolved.

Since *Poletown*, other courts have held that eminent domain may be used to aid private businesses where a larger public purpose is served. In *Blanchard v. Department of Transportation*, 798 A.2d 1119, 2002 ME 96 (2002) the Maine Supreme Court upheld the taking of property for a parking lot. The Maine case is noteworthy because the dissent in *Blanchard* cited the Illinois Supreme Court's decision in this case as representative of a trend of courts to increasingly scrutinize the use of eminent domain powers.

In *Blanchard*, the Department acquired 1.4 acres of land from Blanchard by eminent domain for use as a parking lot for ferry users traveling to and from Chebeague Island. Prior to the taking, Blanchard had leased the lot to the Chebeague Transportation Company (the "Ferry"), a for-profit corporation. The lot lease was set to terminate on January 1, 2000. After conducting extensive studies, the Department concluded that the existing facility on Cousins Island was the only feasible location for the ferry landing

and that the availability of parking on Cousins Island adjacent to the wharf was essential for the operation of the ferry transportation system. The Department acquired the lot in order to ensure that the Blanchard lot would continue to be available for parking once the lease expired. Following the taking, the Department leased the land to the Town for its continued operation as a parking lot. The Town then subleased the parking lot to the Ferry. Blanchard argued that the taking was unconstitutional because the parking lot was not freely accessible by all members of the public and therefore the property was not taken for a public use. Blanchard argued further that the fact that the lot was being leased to and managed by the Ferry, a privately owned company, meant that the use was private because the public did not have access to the lot as a matter of right.

The Maine Supreme Court upheld the taking as meeting the public use test, finding that it was for a public purpose because it supported a transportation system that was open to all members of the public. It also found that the restrictions placed on the lease ensured that the use would remain open to the public. The dissenting opinion did not agree that there was a public purpose for the taking. The dissent stated, "Courts across the country are increasingly scrutinizing the use of eminent domain to ensure that property is not taken for private purposes." *Id.* at 1129, citing the Illinois Supreme Court's opinion in this case. The dissent went on to cite this Court's decision in *Midkiff* for the proposition that, "Property cannot be taken from one private individual solely for the benefit of another private individual." *Id.* at 1130, quoting *Midkiff* 467 U.S. at 245.

The Maine case illustrates the confusion that exists on the application of the precedent set by this Court. It also illustrates the impact the Illinois Supreme Court's decision has already had on one court and foreshadows the impact that it will have on other courts.

In *Minneapolis Community Development Agency (MCDA) v. Opus Northwest, LLC.*, 582 N.W.2d 596 (1998), MCDA condemned private property in downtown Minneapolis for conveyance to and redevelopment by another private party pursuant to legislation that provided for eminent domain in order to provide employment opportunities, to improve the tax base, and to improve the general economy of the state. Minn. Stat. 469.124. Evidence was presented that the taking would provide more parking, increased employment, increased tax base and furtherance of the city's objective of creating an economically viable retail corridor between downtown businesses. *MCDA,* 582 N.W.2d at 599. The court determined that a finding of a public purpose was consistent with the authority granted by the legislature. In so finding, the court rejected a claim for "heightened scrutiny" in any condemnation that benefits private interests, stating that such an application was ". . . out of touch with the national trend, . . . [which is] to 'sanction broad legislative discretion to use eminent domain for a variety of economic development purposes'." *Id.*, *quoting* 2A Nichols on Eminent Domain.

In another state court case, the Missouri Court of Appeals upheld the condemnation of property adjacent to the Kansas City International Airport, which was to be leased to private business for commercial development. *City of Kansas City v. Hon*, 972 S.W.2d 407, 408 (Mo. Ct. App. 1998). Condemnation powers were utilized in order to prevent property owners from making future airport expansion more difficult or expensive. *Id.* at 410. On review, the appellate court upheld the legislature's public use determination, finding that there was a legitimate public benefit in creating jobs and assisting the airport to become self-sustaining. *Id.* In coming to its conclusion, the appellate court found no distinction between the use of condemnation to remove blight versus its use to promote economic development. *Id.* at 414.

The use of eminent domain powers for projects similar to the one at issue, that is, racetracks and sports stadiums, has long been upheld by other courts of review. Arguably, none of these projects would have been built without the use of eminent domain for public redevelopment. *See Mid-America Pipeline Co. v. Lario Ents.*, 716 F. Supp. 511, 517 (D. Kan. 1989) (auto racetrack); *City of Anaheim v. Michel*, 66 Cal. Rptr. 543 (Cal. App. Ct. 1968) (California Angels baseball stadium); *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34, 37 (Fla. 1956) (auto racetrack); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 962 P.2d 543, 554 (Kan. 1998) (auto racetrack); *Kelly v. Marylanders for Sports Sanity, Inc.*, 530 A.2d 245 (Md. Ct. App. 1987) (Camden Yards baseball stadium); *Land Clearance for Redevelopment Corp. v. Doernhoefer*, 389 S.W.2d 780 (Mo. 1965) (St. Louis Cardinals baseball stadium); *New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 580 (N.J. 1971) (football stadium); *G.P. Show Prods., Inc. v. Arlington Sports Facilities Dev. Auth.*, 873 S.W.2d 120 (Tex. Ct. App. 1994) (Texas Rangers baseball stadium); *King County v. Taxpayers of King County*, 949 P.2d 1260 (Wash. 1997) (baseball and football stadium).

IV. "PUBLIC USE" IS AN ELASTIC CONCEPT.

The meaning of "public use" is broad and elastic and the judiciary has given wide discretion to legislatures to take land for a variety of public uses. 2A Nichols on Eminent Domain (3d ed. 2002). These uses do not seem limited to a narrow conception of traditional governmental functions, but, as stated in *Berman* and *Midkiff*, are coterminous with the scope of a state's police power. This indicates that as local needs evolve, so does the apparent scope of the meaning of how a valid "public use" is defined. *Id.* Thus, while some may wish to place limitations on the use of eminent

domain to some narrowly defined public uses, this approach does not seem fruitful. *Id.*

When a legislative determination has been made that it is in the public interest to pursue redevelopment to enhance economic conditions, the power of eminent domain is often a power that is granted in order to accomplish those goals. There is no question that the public purposes for which eminent domain has been utilized has expanded in the last fifty years, due in large part to the decisions of this Court in *Berman* and *Midkiff*. There are now efforts to curtail the use of eminent domain for such projects and they come in the form of facially appealing arguments that seek to protect the sanctity of private property rights. These efforts often ignore the overall public purposes at stake and focus instead on a myopic view of the particular taking in question. The arguments in favor of retrenchment propound a shift in public policy making from the legislature to the judiciary. These efforts only serve to undermine certainty in the limits to which local governments can go to pursue economic development. If such efforts are successful it is quite likely that billions of dollars of redevelopment will be curtailed as a result of the uncertainty that is created. This is a result that is not warranted under existing law and can be prevented by review and clarification of these issues by the Court in this case.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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August, 2002

(4)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 02-34

IN THE

Supreme Court of the United States

Southwestern Illinois Development Authority,
Petitioner,

v.

National City Environmental, L.L.C.
and
St. Louis Auto Shredding Company,
Respondents.

On Petition for Writ of Certiorari
To the Supreme Court of Illinois

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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12 pp

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INTRODUCTION

Several aspects of Respondents' Brief in Opposition are significant and enlightening:

1. Respondents do not deny that the opinion of the Illinois Supreme Court is fairly characterized in petitioner's Question Presented.

2. Respondents make no effort to reconcile the challenged rulings below with controlling decisions of this Court or with any of the other contrary authorities cited in the petition. In particular, they do not — and cannot — show that the Illinois court's prohibition of private benefit resulting from the taking (Pet. 15-16), the requirement of free public access as of right (Pet. 16-18), or the *de novo* judicial review of the legislative determination (Pet. 18-20) are consistent with this Court's jurisprudence or the reasoned decisions of the other state supreme courts that have addressed the question presented.

Respondents attempt to distinguish *Berman v. Parker*, 348 U.S. 26 (1954), as a blighting case (Resp. Br. 22-23), ignoring the fact that the same rules have consistently been applied to takings for other public purposes. *See* Pet. 18-19. They also try to differentiate *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), on the ground that it dealt with a statewide scheme of private property reallocation (Resp. Br. 23-24). Respondents' description of *Midkiff* confirms that it was an enormously more pervasive transfer of private property to other private persons that survived a constitutional challenge because of its public purpose. In any event, respondents' perceived distinction in *Midkiff* is irrelevant to the issues raised here.

3. Respondents do not dispute that the decision below will be a leading player in the developing campaign to

adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1040-41 (emphasis added).

The *Long* test reversed the traditional analysis and required that ambiguities in state court opinions be construed in favor of § 1257 jurisdiction, while still enabling the state court to have the final word in a given case by making such a "plain statement." *See generally* STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE (8th ed. 2002) § 3.24, pp. 202-07.

Long compels the conclusion that jurisdiction exists here. The Illinois Supreme Court stated at the outset of its analysis the general rule that private property cannot be taken for public use without just compensation. It then cited Art. I § 15 of the Illinois constitution and one of its decisions from 1994 (A-9). Immediately thereafter the Court referred to the Fifth Amendment to the United States Constitution, as made applicable to the states by the 14th, and cited this Court's opinion in *Midkiff* (A-10). One paragraph later, the court articulated the public use doctrine, this time citing the Fifth Amendment first and then the Illinois constitution (A-10). No other citations to constitutional provisions appear in the majority opinion.

The majority cited both federal and state cases, invoking *Midkiff* four times, *Berman* thrice, and three other cases from this Court. Nowhere is there a "plain statement" — or, for that matter, any statement — that the court intended to rest its decision on Illinois law. At the very least, the state and federal issues are "interwoven," and *Long* is therefore squarely controlling.

In *Kentucky v. Stincer*, 482 U.S. 730, 735-36 n. 7 (1987), almost the same fact pattern existed. The Court held that it had jurisdiction where the state court

referred to both state and federal constitutions and gave no indication that the respondent's rights under the state constitution were distinct from, or broader than, his federal constitutional rights. Likewise, *New York v. Class*, 475 U.S. 106, 109 (1986), is also directly on point. The Court there upheld jurisdiction where (a) the state high court mentioned the state constitution once, and then only in direct conjunction with the United States Constitution, (b) the state court's opinion made use of both federal and state cases in its analysis, and (c) the opinion lacked the requisite "plain statement" that it was based on state grounds.

Any doubt that the Illinois Supreme Court was engaged in federal constitutional law-making is swiftly and resoundingly dispelled by the dissenting opinion of Justice Freeman, which was joined by Justice McMorrow (A-18). He pointed out that the Illinois public use doctrine was derived from federal law, saying that "this court has, heretofore, been guided by the principles outlined in *Berman*" (A-33). He criticized the majority opinion as "not an accurate rendition of the holdings of *Hawaii Housing Authority* and *Berman* and of the principles of law involved in this area" (A-30). He accused the majority of engrafting requirements upon the Public Use Clause that were specifically rejected in those cases (A-29-30). He called the majority's treatment of those cases "alarming," and "disingenuous," and characterized the majority opinion as "seek[ing] to unravel the holdings of these opinions" (A-38-39).

Justice Freeman, as a member of the court who participated in the extended deliberations over this case (and who wrote the original majority opinion that was vacated on rehearing) (A-46), surely understood both what this case was about and the basis for the majority's ruling. And his dissent will unquestionably

be cited to demonstrate that this is a federal constitutional case.[3]

II. SWIDA Retains Its Power of Eminent Domain, and the Decision Below Affects Not Just SWIDA but Every Public or Quasi-Public Body Possessing the Right of Condemnation.

Respondents also maintain that the issues in this case are unlikely to recur because, according to the newspapers, SWIDA's "quick-take" power of eminent domain was not renewed by the Illinois General Assembly (Resp. Br. 26). Our answer is three-fold: (1) Even if the fast-track method of condemnation is not available under 735 ILCS 5/7-103.70, SWIDA still retains its regular power of eminent domain under 70 ILCS 520/8(b)(A-122), and its use of that power will be constrained by the very opinion now sought to be reviewed; (2) this case remains a live controversy between these parties; and (3) unless straightened out by this Court, the decision below will stand as a formidable impediment to economic redevelopment in each of the 50 states.

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[3] Respondents suggest that the Illinois Supreme Court would likely reach the same result on remand under the state constitution (Resp. Br. 19). Such a potential eventuality poses neither a jurisdictional nor a prudential barrier to review by this Court. In *Arizona v. Evans*, 514 U.S. 1, 9 (1995), the Court quoted *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940), as follows:

> "It is fundamental that the state courts be left free and unfettered by us in interpreting their constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

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August 2002